INDEX.

PAGE

Statement of Facts 1

Questions Presented 5

Argument 6

POINT I—The voluntary appearance of the claimant and respondent, the filing of stipulations for value, the procurement of the release of the vessel, the cross-examination by counsel of libelant, and the trial of the case on the merits is a complete waiver of the right to question the jurisdiction of the Court of the person of the claimant and respondent and of the claim to be immune from process 6

POINT II—The claimant and respondent below is entitled to no immunity ordinarily accorded to a sovereign, it having waived that privilege by engaging in commerce and trade 26

Memorandum Opinion of Mack, C. J., in The Pesaro 27

Supplemental Opinion of Mack, C. J., in The Pesaro 47

POINT III—The decrees should be affirmed, with costs 51

INDEX OF CASES.

PAGE

Alexander, The, 1 W. Roe, 293..... 8
Atkins v. The Disintegrating Co., 85 U. S. (18 Wall.), 272 ..... 6, 7
Attualita, 238 Fed., 909.....36, 43
Athol, The, 1 W. Rob., 374, 382..... 41

Bank of Augusta v. Earle, 13 Pet., 519, 589.. 45
Bank of U. S. v. Planters Bank, 9 Wheaton, 904 .....33, 46
Barnstable (1901), 181 U. S., 464.....40, 42
Bee, The, Ware, 332..... 8
Benedict on Admiralty , 4th Ed., 215..... 8
Bank of Kentucky v. Wister, 2 Peter, 318.... 33
Bonfils, Manuel de droit International, 7th Ed., Sec. 629..... 43
Briscoe v. Bank of Kentucky, 11 Peter, 256.. 33
Briggs v. The Light Boats, 11 Allen, 157....36, 37
Broadmayne, The, 1916 Prob. Div., 64..... 38
Beale I Conflicts of Law, Part 1, p. 103..... 45
Belgenland, The, 114 U. S., 355..... 46

Carr v. The U. S., 98 U. S., 433.....9, 10
City of Los Angeles v. Los Angeles Gas, 251 U. S., 32..... 44
Clark v. Barnard, 108 U. S., 436.....8, 11
Curran v. Ark, 15 How., 304, 308..... 33
Charkieh, The, L. R. 4, A. and E., 59..... 37
Cluna, The, 7 Wall., 53.....40, 42

Davis, The, 10 Wall., 15.....36, 43
DeSimone v. Transportes Maritimos etc., 200 App. Div. (N. Y.), 182..... 19
De Foro Legatorum, Ch. IV..... 32

PAGE

Eliza Jane, The, 3 Hag. Ad. R., 337..... 8
Exchange, The, 7 Cranch., 116.....9, 31

Freeman v. Freeman, 126 App. Div. (N. Y.), 601) 8
Fidelity, The, 16 Blatchf., 569..... 36

Gagara, The, 1919 Prob. Div., 95..... 38
Girolamo, The, 3 Hag. Ad. R., 173..... 8
Gladiator, The, 3 Hag. Ad. R., 340..... 8
Grant v. Birrell, 35 Misc. (N. Y.), 768.....8, 23
Gunther v. Atlantic Coast Line, 200 U. S., 273 11

Halley, The, L. R. 2 P. C., 193, 201..... 41
Hamburger v. Baker, 35 Hun (N. Y.), 455..20, 21
Hilton v. Guyot, 159 U. S., 113..... 45
Homer Ramsdell Co. v. Com. Gen. Trans., 182 U. S., 406, 413..... 40
Hussein Lufti Bey decided, In re, 41 Sup. Ct. Rep., 609 .....9, 29

Jassy, The Probate (1906) 270.....14, 25, 38
Johnson Lighterage Co., 231 Fed., 365..... 36
John G. Stevens, The (1898), 170 U. S., 113, 122 40

Lake Monroe, The, 250 U. S.,246..... 39
Laski, The Responsibility of the State in England, 32 Harvard L. Rev., 447..... 30
Lord, Admiralty Claims against the Government, 19 Col. L. R., 467..... 30
Louisville R. R. v. Letson, 2 How., 497, 550.. 33
Lord & Burnham v. U. S. S. B., E. F. C., 265 Fed., 955, 957..... 33
Long v. Tampico, 16 Fed., 491.....36, 43

PAGE

Maria, The, 1 W. Rob., 95, 106..... 40
Meyers v. American Loco. Co., 201 N. Y., 163. 8
Maipo, The, 252 Fed., 627, 259 Fed., 367.... 30
Manning v. State of Nicaragua, 14 How. Pr. (N. Y.), 517..... 17
Muir, The, 255 U. S. (Jan. 17, 1921)..... 29
Maguire, State Liability for Tort, 30 Harvard L. R., 20..... 30
Mason v. Intercolonial Ry., 197 Mass., 349... 37

Neptune II, The, 1 Dod., 467..... 41
Nereide, The, 9 Cranch., 388, 422..... 45

Panama R. R. v. Curran, 256 Fed., 772..... 33
Pesaro, The, 255 U. S. (Feb. 28, 1921)..... 28
Pennoyer v. Neff, 95 U. S., 714..... 6
People v. Dennison, 84 N. Y., 272.....9, 10
Porto Rico v. Ramos, 232 U. S., 627.....11, 13
Porto Rico v. Rosaly, 227 U. S., 270..... 11
Protector, The, 1 W. Rob., 62..... 8
Parlement Belge, The, 4 Prob. Div., 129..... 37
Porto Alexandre, 1920 Prob. Div., 30..... 38

Ralle v. Troop (1894), 157 U. S., 386..... 40
Reed v. Chilson, 142 N. Y., 152.....8, 21, 22
Rhode Island v. Massachusetts, 37 U. S. (12 Peters), 657 .....8, 11, 25
Richardson v. Fajardo Sugar Co., 241 U. S., 44 11

Sarah Jane, The, 7 Jur., 659..... 8
Siren, The, 7 Wall., 152..... 41
Smith v. First Nat. Bank, 103 Misc. (N. Y.), 271 8
Street v. Tuttle, 14 N. Y., 465..... 20
Stanley v. Schwalby, 162 U. S., 255.....9, 10

PAGE

State of New York, The, v. The Queen City, 41 Sup. Ct. Rep., 592.....9, 36
State of New York, In re, Ex parte, U. S. Sup. Ct. (June 1, 1921)..... 30
South Carolina v. U. S., 199 U. S., 437.....30, 45

Taylor v. Morley, 1 Curteis, 481..... 8
Sloan Shipyards v. U. S. Shipping Board, etc., U. S. Sup. Ct. (May 1, 1922)..... 51
U. S. v. Lee, 106 U. S., 196.....9, 10, 30
U. S. v. N. Y. & O. S. S. R. R. Co., Ltd., 216 Fed., 61 6
U. S. v. Wilder, 3 Sumner, 308.....30, 34, 41

Veitia v. Fortuno Estate, 240 Fed., 256..... 11
Varasseur v. Krupp, L. R. 9 Ch. Div., 351..14, 15
Weston, Actions against the Property of Sovereigns, 32 Harvard L. R., 266..... 30

Wheaton on International Law (1916), 161.. 38
Whyte v. Gibbes, 20 How. (61 U. S.), 541.... 6
Workman v. N. Y., 179 U. S., 570..... 41

Young v. Scotia, 1903 A. C., 501..... 38

Supreme Court of the United States

OCTOBER TERM, 1922.

THOMAS DESIMONE, Libelant-Appellee, against Steamship "MURMUGAO," her engines, etc., Claimant-Appellant.	Nos. 282-283.
THOMAS DESIMONE, Libelant-Appellee, against TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	

BRIEF FOR APPELLEE THOMAS DeSIMONE.

Statement of Facts.

Thomas DeSimone, a ship chandler, doing business in New York City, provisioned the steamship Murmugao on the 19th day of August, 1920, at the request of persons in charge of the ship. He furnished this vessel with merchandise of the agreed price and reasonable value of $23,717.04, to en-

able her to clear, make her voyage, discharge and load her cargo. Officers of the vessel receipted for the merchandise and she left port without paying the bill.

On August 27, 1920, he similarly provisioned the steamship Santo Antao with merchandise of the agreed price and reasonable value of $7,987.18, and on the 1st day of September, 1920, he furnished the steamship Cunene with merchandise of the agreed price and reasonable value of $8,567.32.

These three vessels were owned and operated by the Transportes Maritimos Do Estado.

When the Murmugao came back to the Port of New York, in December, 1920, she was arrested upon process issued by the District Court of the United States for the Southern District of New York, upon a libel *in rem* and a libel *in personam*, both by Thomas DeSimone, and upon libels of the other libelants. The libel in DeSimone's suit *in rem* was brought for the recovery of $23,717.04 interest and costs, for the provisions furnished to that ship. The libel *in personam* set forth that the Transportes Maritimos Do Estado was a foreign corporation, organized under the laws of Portugal, and the owner of the steamship Murmugao, and prayed for the recovery of $16,554.50, for the merchandise sold to the Cunene and the Santo Antao, both owned by that company.

On December 13, 1920, Frank M. Patterson, Esq., filed with the Clerk of the District Court a notice that he appeared for the ship and the Transportes Maritimos Do Estado and filed stipulations for value and thus secured the release of the vessel.

In neither the stipulations for value nor the notice of appearance was any claim made reserving

any rights on the question of jurisdiction. The appearance was general and in nowise limited.

To these libels, on December 24, 1920, answers were interposed. The answers to both libels are substantially the same and each of them was verified by Joseph Roca Prista, the Acting Consul General for the Government of Portugal at the City of New York. The answers admitted the ownership of the vessels in the Transportes Maritimos Do Estado; admitted the sale and delivery of certain merchandise, but they undertook to deny the other material allegations of the libel; and by way of separate defense, in both cases, it was asserted that the ships in question were the property of the Transportes Maritimos Do Estado, a department of the Government of Portugal, and that they were owned and operated by such Government and therefore the Court was without jurisdiction.

It should be noted at this time that there is no *affirmative allegation in the answer in the action in personam that the Transportes Maritimos Do Estado is not a foreign corporation. It should also be noted that there is no claim in the answer that the ships were devoted in anywise to the public uses of the Government of Portugal; nor is there an allegation or averment in the answer that these vessels were other than merchant vessels, engaged in ordinary commerce and trade.*

Exceptions were filed by the libelant to the sufficiency of the defenses in the answer, and they were brought on for argument before Manton, J., who denied the libelant's application to sustain the exceptions, in a written opinion, which may be found at page 46 of the appellant's brief.

Subsequently, the cases came on for trial before Manton, J. Libelant offered proof of the sale and

delivery of the merchandise. *The claimant and respondent cross-examined libelant in detail as to the merits,* and then, after the libelant had completed his *prima facie* cases in both suits, counsel for the claimant and respondent sought a postponement to prove that the vessels were owned and operated by the Portuguese Government. He asserted that he rested solely upon the defenses stated in the answer; that he had no evidence to contest the claims of the libelant on the merits, and the Court thereupon made the following decision:

> "I think I will give a decree for the libellant in the case of De Simone vs. S. S. Mormugao for the amount in full, with interest, amounting to $25,503.73, and I will grant a decree against the corporation for the full amount of $17,775.62. The Court finds it in that way rather than to send this matter to a commissioner to take proof as to the damage. *The respondent, after having appeared and answered generally, cannot avail itself of that part of the answer which sets up the special defence of sovereignty in the ownership and operation of the vessels.* We might have stricken out that part of the answer and sent the matter to a master to ascertain the damages, but in view of the fact that the libellant has been deprived of what unquestionably is his, the full amount here awarded to him, he should not be further delayed, but is entitled to a decree. This is particularly the case in view of counsel's admission that he cannot and will not contest the delivery of the goods or the amount which is claimed to be due and owing him. Decree may be presented accordingly.
>
> I decline to further postpone because the proof which counsel for the respondent suggests he would offer from the Portuguese

> Consul would not change the result, as long as *I hold that the defence of sovereignty ownership is not available at this time to either of the respondents.*"

There are thus presented to this Court the following questions:

1. Did the Transportes Maritimos Do Estado by appearing generally in these suits, filing stipulations for value, securing the release of the vessel upon such stipulations, *participating in the trial on the merits,* waive the right to claim immunity, if any exists, on the ground that the action, in effect, is directed against a foreign sovereignty?

2. Assuming that the vessels are owned by the foreign sovereignty, through an agency employed by it for that purpose, does any immunity exist, in the absence of an averment or allegation in the answer that the vessels were employed at the time of the sale of the merchandise as a public ship, exclusively engaged in the performance of national functions? In other words, is a public ship, used for trading purposes, entitled to claim immunity from arrest; or is a foreign government, engaged in ordinary commerce and trade, immune from jurisdiction of our courts in matters arising out of such commercial enterprises?

POINT I.

The voluntary appearance of the claimant and respondent, the filing of stipulations for value, the procurement of the release of the vessel, the cross-examination by counsel of libelant, and the trial of the case on the merits is a complete waiver of the right to question the jurisdiction of the court of the person of the claimant and respondent and of the claim to be immune from process.

It is axiomatic that, where the court has jurisdiction of the subject-matter, jurisdiction of the person may be conferred by consent.

Whyte v. *Gibbes*, 20 How. (61 U. S.), 541.

Accordingly, it has been held that, where a party appears generally in an action, he waives all objection to the jurisdiction of the court of his person.

Pennoyer v. *Neff*, 95 U. S., 714.
U. S. v. *N. Y. & O. S. S. R. R. Co., Ltd.*, 216 Fed., 61.

And this rule is equally applicable to causes in admiralty.

Atkins v. *The Disintegrating Co.*, 85 U. S. (18 Wallace), 272.

In the latter case, Mr. Justice Swayne, in deciding that the court had jurisdiction of the person of the defendant, *in personam*, thus gave his opinion at page 298:

> "The statement of the case, which we have given, shows that the defendants entered their appearance without reservation. If there could be any doubt upon the subject it is removed by their repeated subsequent recognitions of the fact. This made their position just what it would have been if they had been brought in regularly by the service of process. *In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete* (Pollard v. Dwight, 4 Cranch, 421; Knox v. Summers, 3 Id. 496). This warranted the decree *in personam* for the amount adjudged to the libellants."

What is the nature of this so-called immunity claimed by the claimant and respondent, is the pertinent inquiry. Is the immunity such as deprives the court of jurisdiction of the subject-matter, or is it such as affects the court's jurisdiction of the person of the claimant and respondent?

If it is the former, it cannot be denied that if the immunity does exist—which is here earnestly disputed—then it may be raised at any stage of the proceedings, whether pleaded in the answer or otherwise. If, on the other hand, it affects the question of the jurisdiction of the person of the claimant and respondent, did not its general appearance, filing of bond and securing the release of the vessel thereunder, the filing of an answer denying the allegations concerning the merits of the complaint, participation in the trial, and the cross-examining of witnesses of libelant, effectually bar that right? The practice is well established and long recognized that where a party is proceeded against in any court and desires to question the jurisdiction of the court over his person, he may do so by special

appearance for that purpose only, and where he appears generally whether reserving that question in his answer or otherwise, he cannot be heard to deny the jurisdiction of the court over his person.

Rhode Island v. *Massachusetts,* 37 U. S. (12 Peters), 657.
Clark v. *Barnard,* 108 U. S., 436.
Reed v. *Chilson,* 142 N. Y., 152.
Meyers v. *American Locomotive Co.,* 201 N. Y., 163.
Grant v. *Birrell,* 35 Misc. (N. Y.), 768.
Freeman v. *Freeman,* 126 App. Div. (N. Y.), 601.
Smith v. *First National Bank,* 103 Misc. (N. Y.), 274.
Benedict on Admiralty, 4th Ed., p. 215.
Prankard v. *Deacle,* 1 Hag. Ecc., 185.
The Girolamo, 3 Hag. Ad. R., 173.
The Gladiator, Id. 340.
The Eliza Jane, Id. 337.
The Protector, 1 W. Rob., 62.
The Alexander, Id. 293.
The Sarah Jane, 7 Jur., 659.
Taylor v. *Morley,* 1 Curteis, 481.
The Bee, Ware, 332.

Of course, if the plea relates to the subject-matter, it may be raised at any time. It follows that the question to be here determined is whether or not the immunity claim is such as affects the subject-matter or the person of the defendant, and if it does affect the person of the defendant, whether the general appearance is a consent to the assumption of jurisdiction.

In this country the principle is well established that foreign sovereigns are privileged from all process issuing out of our courts and immune from their jurisdiction with respect to matters affecting them in their public functions.

The Exchange, 7 Cranch., 116.

Whether a sovereign enjoys such immunity with respect to controversies arising out of transactions in which it is not engaged in its public capacity but rather as a private individual, such as transactions relating to commerce and trade, is a question that is still open for debate, as is indicated by this court in *Matter of Hussein Lufti Beydender,* June 6, 1921, 41 Sup. Ct. Rep., 609; *The State of New York* v. *The Queen City,* decided June 1, 1921, *id.,* p. 592. Likewise, it is well settled that the domestic sovereigns, the United States of America or any State of the Union, is likewise immune from the jurisdiction of their own courts.

Carr v. *The United States,* 98 U. S., 433.
Stanley v. *Schwalby,* 162 U. S., 255.
People v. *Dennison,* 84 N. Y., 272.

The so-called immunity accorded a foreign sovereignty, while similar to the immunity granted to the United States or any other State or Territory of the Union, does not spring from the same source. The latter is a development of international law, the result of the delicate relations affecting nation and nation, while the former finds its root in the common law of England.

United States v. *Lee,* 106 U. S., 196.

This distinction is not unimportant, nor must it be lost sight of.

Appellant urges that there can be no implied waiver by a general appearance by an attorney or proctor, under Point IV of its brief, citing, among others, *Carr* v. *United States,* 98 U. S., 432; *People* v. *Dennison,* 84 N. Y., 272; *Stanley* v. *Schwalby,* 147 U. S., 508, and other cases which manifestly have no application.

It is true, as announced in the cases cited, that a domestic sovereign does not by the general appearance of any of its officers or agents waive the right to claim immunity from suit. This because, as Mr. Justice Miller in *United States* v. *Lee,* points out, *supra:*

> "The King of England is not suable in the courts of that country, except 'where his consent has been given on petition of right.' * * * There is in this country no such thing as a petition of right, as there is no such thing as a kingly head to the nation or any of the states which compose it. There is vested in no officer or body the authority to consent that the state shall be sued, except in the law making power which may give such a consent on terms it may choose to impose. (The Davis, 10 Wall. 15.)"

Hence it follows that the officers of a state undertaking to appear in an action brought against it cannot vest the court with jurisdiction, unless a statute can be found granting this privilege to the litigant. On the other hand, the foreign sovereign does not stand upon an equal footing. Should he undertake to appear in an action and answer to

the merits, he may not thereafter withdraw without the consent of the court.

Rhode Island v. *Massachusetts,* 37 U. S. (12 Peters), 657.
Clark v. *Barnard,* 108 U. S., 436,

quoted with approval in:

Gunter v. *Atlantic Coast Line R. R. Co.,* 200 U. S., 273.
Porto Rico v. *Ramos,* 232 U. S., 627.
Porto Rico v. *Rosaly,* 227 U. S., 270.
Richardson v. *Fajardo Sugar Co.,* 241 U. S., 44.
Veitia v. *Fortuno Estate,* 240 Fed., 256.

In the case of *Clark* v. *Barnard,* 108 U. S., 436, quoted with approval in *Gunter* v. *Atlantic Coast Line Railroad Co.,* 200 U. S., 273, an action was brought by the assignees in bankruptcy of the Boston, Hartford & Erie Railroad Company against Samuel Clark, General Treasurer of the State of Rhode Island, the City of Boston and Fred U. Tracy, its Treasurer. Clark filed a demurrer for want of jurisdiction on the ground that it was in substance a suit by the citizens of one state against the State of Rhode Island. The demurrer was overruled. Clark then filed his answer denying the material allegations of the bill and asserting that the transaction was with the State of Rhode Island, through its treasurer in his official capacity.

The case then proceeded to trial. The Supreme Court, by Matthews, J., then said in respect to this question:

"The first question for determination on this appeal is that of jurisdiction, raised first by the demurrer and afterwards by the answer of Clark, General Treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against the State by citizens of another state, contrary to the eleventh amendment to the Constitution of the United States. We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in Court. *The immunity from suit belonging to a state, which is respected and protected by a Constitution within the limits of a judicial power of the United States, is a personal privilege which it may waive at pleasure;* so that in a suit, otherwise well brought, in which a state had sufficient interests to entitle it to become a party defendant, *its appearance in a Court of the United States would be a voluntary submission to its jurisdiction;* while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case, the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceedings became one in the nature of an interpleader in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title. The case differs from that of Georgia v. Jesup, 106 U. S. 462 (1 Sup. Ct. Rep. 363), where the state expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the Court. The circumstance

> that the appearance of the State was entered without prejudice to the demurrer of Clark, the General Treasurer, does not affect the result. For that demurrer could not reach beyond the question of the right to sue Clark by reason of his official character, which became insignificant when the state made itself a party; and in point of fact the bill was framed to avoid the objection, by charging Clark as a wrong-doer in his individual capacity."

In the case of *Porto Rico* v. *Ramos, supra,* the State of Porto Rico petitioned to be made a party to the action, being granted leave to file a demurrer. The application being granted, the State of Porto Rico thereupon demurred, on the ground that Porto Rico being a sovereignty the court had no jurisdiction. The demurrer being overruled, it filed an answer denying the material allegations of the complaint, and setting up by way of affirmative defense that it had such attributes of sovereignty as exempted it from suit. The case came on for trial, and a verdict rendered against the defendant. The Supreme Court of the United States thus wrote:

> "The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view, but the immunity of a sovereign from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of Court at its will; the other party having no right of resistance to either step."

In every one of the English cases cited by the appellant as authority for the proposition that the sovereign is immune from suit, there was either a

special appearance or a special protest to the jurisdiction of the court and no general appearance, with the exception of the following cases: *The Jassy,* Probate (1906), 270, and *Vavasseur* v. *Krupp,* L. R. 9 Chancery Division, 351.

These two cases require special consideration.

To digress for a moment, it may be pointed out at this time that the English courts have undoubtedly held that a sovereign is immune from jurisdiction whether the matter arises out of a public or a private transaction. But we shall take the liberty of commenting further upon these authorities below.

In the case of *The Jassy, supra,* the vessel was arrested at Liverpool, but was released upon a bond given by a firm of solicitors under instructions from the Liverpool agents of the ship. Thereafter an appearance was entered on behalf of the agents of the ship by the London solicitors of the same firm of agents. Some time later these London agents wrote to the plaintiff's solicitors informing them that the Jassy was owned by the Roumanian Government, and suggesting that the plaintiff withdraw from further prosecution of the action, but this the plaintiff declined to do. Following this event, the Charge d'Affairs of the Roumanian Government addressed a letter in the nature of a certificate to the Secretary of State of Foreign Affairs, pointing out that the ship was a public vessel of the Roumanian Government, owned and worked by the state for its public purposes, including carrying of mail, passengers and cargo, in connection with the national railways of that country, and *that appearance and bail was given under a misapprehension on the part of the local agents to secure her immediate release and without the consent*

or authority of the Roumanian Government, and when the facts were drawn to the attention of his Government he was instructed to intervene. Copy of the letter was forwarded by the Secretary for Foreign Affairs to the court, and application made to dismiss. Counsel for the plaintiff argued that the appearance was general and thus unlike the cases where the immunity was held to exist. The presiding judge, on the other hand, *held that since the appearance was unauthorized the action should be dismissed.*

The inference is thus clear that, had there been no suggestion of lack of authority on the part of the agent or solicitors to enter a general appearance, a contrary rule would have been adopted.

In the case of *Vavasseur* v. *Krupp, supra,* plaintiff brought an action against Krupp, of Essen, Germany, and another, his local agents, as well as the agents of the Government of Japan, claiming an injunction and damages for the infringement of the plaintiff's patent for making shells and other projectiles. He asserted that shells had been brought into England and landed there to be put on board of three ships of war belonging to the Government of Japan which were then being built in England. The injunction was issued without prejudice to the merits of the case, restraining any person from parting with or selling or disposing of the shells or projectiles during the pendency of the action. The Mikado of Japan and his Envoy Extraordinary in England thereupon made application to be added as defendants in the action, and asked that the injunction be dissolved and the Mikido given liberty to take possession of this ammunition and remove them out of the jurisdiction

of the court. It was argued that the Mikado by making himself a party defendant in the suit had submitted himself to the jurisdiction of the court, and the injunction should therefore be continued pending the final determination of the action. The court below granting the Mikado the right to remove the shells out of the country did not pass squarely upon this question. Three opinions were rendered on appeal. James, L. J., held that the submission to the jurisdiction was not intended to be general, but was for a special purpose only, that is, to secure the removal of the property. Brett, L. J., took the position that on the merits the entire action was not maintainable because the property belonged to a foreign sovereign, and did not pass on the merits. Cotton, L. J., acquiescing in this view, held that the appearance was conditional only.

In the case at bar no claim has been made that the appearance by counsel has been unauthorized, and no attempt was made before the action came to trial to withdraw the general appearance. Indeed, counsel undertook to examine the witnesses for the libelant, and participated in the trial on the merits. There is not a suggestion in the so-called affirmative defense in the answer that Mr. Frank M. Patterson was not authorized to appear generally.

If the subject of immunity were one which affected jurisdiction of the subject-matter, then, of course, it would have been quite proper to set this fact up by way of affirmative defense, or, indeed, it would not have been necessary at all to make such an affirmative plea, for the question could be raised at any stage of the proceedings whether pleaded or otherwise. But is the matter one that

affects the jurisdiction of the subject-matter? The fact that a sovereign can submit to the court a controversy, should it choose to do so, indicates clearly that it relates to jurisdiction of the person, because otherwise its consent to litigate would be a nullity.

In the case of *Manning* v. *State of Nicaragua,* 14 How. Pr. (N. Y.), 517, the State of Nicaragua was made a party defendant to a suit. A co-defendant demurred on the ground that the State of Nicaragua was evidently a sovereign and could not be sued in courts of another state. The court thus wrote (pp. 517-519):

> "Undoubtedly, a sovereign, or a sovereign state, in their political capacity, cannot be sued in the courts of another state or nation for the purpose of enforcing any remedy against them. In short, they are not subject to the coercive power of any judicial tribunal, except where they may have expressly consented, as by treaty (a possible case), or like the sovereign states of this confederation, by a federal compact, for the purpose of forming 'a more perfect union.' But cannot a state be made a defendant in an action for the purpose of giving it an opportunity to appear, and thus to enable a court to decide more intelligently and equitably in relation to demands which are sought to be enforced against other defendants? There is nothing necessarily derogatory to the character or independence of a state to be mentioned merely as defendants conjointly with others in an action. The joinder may amount to nothing more than an invitation to appear by their representatives or agents, and it may be their desire to accept the invitation if they consider that their appearance would be conducive to jus-

tice or to their own interests. States, as well as individuals, it may be presumed as a general rule, are the best judges of what affects their own dignity and advantage, and it may be safely left to their own sovereign option to determine whether they shall take part or not in any judicial controversy, not for the purpose of submitting themselves to the coercive power of the court, but, as I have said, for the purpose of enabling it to arrive at a correct and satisfactory determination. If then the mere joinder of a state in a civil action is no derogation from its dignity, or infringement of its sovereignty, the action is not on that account necessarily and inevitably untenable, and a demurrer to the complaint on that ground cannot be maintained. The objection upon which it is founded is at least premature.

The appearance indeed of the state cannot be enforced any more than a judgment against it; and if it should not voluntarily appear, the court may or may not be able to adjust or determine the ultimate rights of the other parties. If it should find itself incapable of doing this, in consequence of not being able to adjudicate against the other defendants, without being able to adjudicate also against the state, it will, as a matter of necessity, dismiss the action. But evidently it cannot be ascertained until the hearing whether the state shall exercise its option to appear, or whether the final adjudication can be properly made without its appearance, and, consequently, if my position that the state may or may not appear at its option is correct, the objection presented by the Accessory Transit Company cannot be entertained in this form, or at this stage of the action."

If the State of Nicaragua had appeared in the action and pleaded to the merits, it must follow that its immunity would have been waived. It would be most unjust to hold that, notwithstanding its appearance and hearing on the merits, it could then shield itself by asserting its immunity.

A defense in an answer, in our system of pleading, can have no relation to the defect in the process, and its office is clearly to dispose of the right to maintain the cause of action and to destroy what would otherwise be the merit of the claim of the party complaining. The so-called defense in the answer here has no such purpose. It asserts an immunity from the process of the court, and the claim that the respondent cannot be drawn into litigation. If such right does exist, it should be asserted before answer on the merits or participation in the trial, by way of special appearance or motion. To permit anyone to delve into the merits and then escape the judgment of the court seems to be repugnant to our methods of administering justice.

Reliance is placed on the case of *DeSimone* v. *Transportes Maritimos Do Estado,* 200 App. Div. (N. Y.), 182, as authority for the proposition, first, that it was proper to raise the defense in an answer because it affected the jurisdiction of the subject-matter and not of the person, and, second, that the general appearance was not and could not be held to be a waiver of the right to claim this immunity.

It is necessary to analyze the decision of that court to determine whether or not its reasoning is correct. Simultaneously with the filing of the libel, DeSimone sued the Transportes Maritimos Do Estado in the Supreme Court of the State of New

York. By its counsel, Frank M. Patterson, it interposed an answer, containing a number of defenses, namely, the plea that the admiralty suit at bar was then pending and, again, the plea of immunity.

It is necessary to observe, as the court will find at page 29 of the appellant's brief, that the answer in that case, unlike the answer in the case at bar, contained the following allegation:

> "That the steamships Murmagoa, Santa Anteo and Cunene are Portuguese vessels, flying the flag of Portugal, owned and operated by the Government, and *engaged in the public service of Portugal.*"

There is no allegation in the answer here that the ships were engaged in the public service of Portugal.

A demurrer was interposed to the answer, on the ground that it was insufficient in law upon the face thereof, plaintiff's contention being that the answer was a general appearance, and that defense was therefore waived.

In its first opinion the court held that the answer was not equivalent to a general appearance but it amounted to a special appearance, and in any case amounted to a claim withdrawing the consent to litigate on the merits, which the answer might otherwise have given. The court supported its ruling by citing *Sweet* v. *Tuttle,* 14 N. Y., 465, and *Hamburger* v. *Baker,* 35 Hun (N. Y.), 455.

When the Circuit Court of Appeals had rendered its opinion in the case at bar, deciding directly contrary to the Appellate Division, an application was made to the Appellate Division for a reargument.

We pointed out that the court had fallen into error, because under the Code of Civil Procedure of New York, Section 421, now Section 237 of the Civil Practice Act, the answer amounts to a general appearance, and the case of *Hamburger* v. *Baker* was directly disapproved in the case of *Reed* v. *Chilson*, 16 N. Y. Supp., 744, where the court wrote as follows:

> "So much time would not have been occupied on this subject but for the case of Hamburger v. Baker, 35 Hun, 455, in which it is held that, where the defendant appears generally by answer, he may still raise the question of jurisdiction. In that case the appearance was made by the service of an answer, which the Code says is a general appearance. It differs from the two cases last cited for the reason that in those cases the answer denying the jurisdiction was served some time after the notice of retainer. But I do not think that difference affects the principle. The appearance consists in the service of the answer, and the contents of the answer cannot change the effect produced by its service which is prescribed by the Code. It will be noticed that the Hamburger case pays no attention to section 424 of the Code. No cases are cited to sustain the decision. I have looked carefully, and can find but two in which the precise question was presented, and in each of those cases the decision was just the other way from that in the Hamburger case. Olcott v. MacLean, 73 N. Y. 223; Carroll v. Lee, 22 Amer. Dec. 350. In the case of Wheelock v. Lee, and the others cited above, in which the objection to the jurisdiction was sustained after the entry of a general appearance, the ruling was put upon the ground that the want of jurisdiction was not because the defendants were

> not properly in court, but because the court had no power to determine the matter submitted to it. In each of those cases it was assumed that if there had been jurisdiction over the subject-matter, the appearance would have given complete power over the person, notwithstanding the plea. *I do not think the case of Hamburger* v. *Baker was correctly decided, and it should not be followed. My conclusion is that the court has jurisdiction of this action. The defense of a former judgment in this state is not available, for the reason that there was clearly no jurisdiction to render it.*"

It will be noted that in that case the court pointed out that the answer was equivalent to a general appearance, and directly contrary to the holding of *Hamburger* v. *Baker*. The attention of the Appellate Division was further directed to the fact that the decision of the court in *Reed* v. *Chilson, supra*, was reviewed by the Court of Appeals, 142 N. Y., 152, the court writing its own opinion, as follows:

> "It is urged that the defendants were obliged to appear and present the facts to the court or suffer default, and, therefore, the appearance was not voluntary. This does not change the effect of the appearance. *When a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own*

act. But if the defendant elects to come before the court and there try the questions, he cannot afterwards deny the jurisdiction, or be heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action."

Thus, while *Hamburger* v. *Baker* was not expressly overruled, by fair implication its authority as a valid legal precedent was completely negatived. In its opinion on reargument, the Appellate Division further elaborately reconsidered the question of the immunity of a sovereign and adhered to its former decision, stating: "In the Hamburger case, and in the case at bar, no notice of appearance was served, but the appearance was effected by the service of an answer, and maintaining that the answer in the case at bar was equivalent to a special appearance." This despite the fact that the attention of the court was called to the fact that a general notice of appearance had been served before the answer was interposed, as in the case at bar, and also to the case of *Grant* v. *Birrell,* 35 Misc. (N. Y.), 768, where the court wrote:

"A defendant who voluntarily appears and answers, though the answer in terms reserves the right to object to the jurisdiction of the court, is precluded from objecting that the court did not acquire jurisdiction of his person. Mahaney v. Penman (Hoffman, J., concurred in by Oakley, C. J., and Duer, J.), 4 Duer, 603. A notice of appearance after a denial of a motion to set aside service of a summons upon a defendant who was served while a witness gives the court general jurisdiction of the person. Woodruff v. Austin, 16 Misc. Rep. 543, 38 N. Y. Supp. 787. A general appearance gives jur-

> isdiction even where there was no property in the state, and defendant was served only by publication. Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Christal v. Kelly, 88 N. Y. 286."

The court, finding its position weakened on the application for reargument by these prior decisions, went on to advance the proposition that the defense did not only relate to the person of the defendant but to the subject-matter of the action as well. Of course, if it actually did relate to the subject-matter, then whether the general appearance constituted a submission to the jurisdiction or not would have become quite academic. It is interesting to note, however, the court's observation that the action for goods sold and delivered would ordinarily come within the court's jurisdiction, but it went on to say:

> "It is more than this, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot have jurisdiction except with its consent. In the case of The Parlement Belge (supra) (page 220) the Court said: 'It has been held that an ambassador cannot be personally sued, although he has traded, and in both cases because such suit would be inconsistent with the independence and equality of the state which he represents.' "

We shall hereafter demonstrate that while this may be the rule in England it is unjust, unscientific and should not be established as a valid principle in this country.

The Appellate Division of the New York Supreme Court held that the sovereignty of a state of the Union is not like the sovereignty of an independent

nation, and while it is true, acquiescing in the rule that a state may waive its immunity from suit in the federal court by a general appearance and answer, a foreign sovereignty cannot be so treated, because to do so might give rise to a *causus belli*. We do not share in that court's apprehension in that regard. If a state or foreign sovereignty inadvertently or under a misapprehension causes its representative to appear generally and plead to the merits, or should the counsel without authority undertake to appear in a litigation and thus consent to the jurisdiction of the court, the sovereignty is not without redress. It need not go to war to protect its rights. Certainly the court has the power to permit it to withdraw its general appearance, upon proof that its counsel acted without authority or that the appearance was by inadvertence.

State of Rhode Island v. *State of Massachusetts*, 12 Peters, 657,

where the court gave permission to the State of Massachusetts to withdraw its general appearance, if it was so advised, holding that it had jurisdiction of the subject-matter.

See also *The Jassy, supra.*

No request was made here before trial on the merits or at any other time to withdraw the answer or the general appearance.

POINT II.

The claimant and respondent below is entitled to no immunity ordinarily accorded to a sovereign, it having waived that privilege by engaging in commerce and trade.

The answer of the appellant in the case at bar contains no affirmative allegations that its ships were engaged in the public service of the Government of Portugal and were not merchantmen. Indeed, the deposition submitted by the appellant, as Exhibit I, conclusively establishes the fact that the Transportes Maritimos Do Estado was an agency established by the Portuguese Government, similar to our Shipping Board Emergency Fleet Corporation, to engage in the ordinary pursuits of a mercantile marine and as merchant vessels and as common carriers for hire. It cannot be claimed, of course, that the deposition is in anywise binding on the appellee in this court. Had we been permitted to participate in the taking of this deposition, there are many pertinent inquiries that might have been made of the head of this agency. For instance, it would be interesting to know whether or not the ships were manned by ordinary seamen or by naval officers. It is important to inquire how much of the space on these ships was devoted to governmental operations and how much was used for ordinary trading purposes. How often were these vessels full of government cargoes and when was the vacant space at the disposal of shippers? Are the ships of this agency subject to suit in their own country, and is the immunity which is sought a privilege only to be accorded the vessel in for-

eign ports? It is interesting to note the fact that this case was at issue almost a year before it was finally tried, and no attempt was here made to take a deposition. We may safely assume, therefore, that the vessels were not engaged in governmental pursuits, but were mere merchant traders.

The question then presented is: Does the immunity which is ordinarily accorded a foreign sovereignty obtain in such a case? We rely entirely upon the views expressed in the following opinions of Mack, J., Circuit Judge, in the case of The Pesaro, which we earnestly urge should be adopted by this court. The field has been fully covered by this eminent and learned jurist, and to add anything more thereto would be like carrying coals to Newcastle:

MEMORANDUM OPINION.

MACK, *Circuit Judge:*

Libel *in rem* against the steamship *Pesaro* to enforce a claim for damage to a cargo of olive oil shipped thereon. Previously, when the ship was libelled to enforce the same claim, upon the direct suggestion by the Italian Ambassador that the ship was owned by the Italian Government and at the time of the arrest was in its possession and therefore was not subject to arrest, this Court vacated the arrest. Upon appeal, the Supreme Court upheld the libellant's objection that this suggestion must come through the official channels of the United States. The Court added that it had no occasion at that time to consider what the decree should have been if the matters affirmed in the suggestion had been brought to the Court's attention

and established in an appropriate way. *The Pesaro,* 255 U. S. , decided February 28, 1921.

By stipulation, the parties have agreed that the question of jurisdiction shall be decided upon the basis of the following facts: First: That the steamship *Pesaro* was owned by the Kingdom of Italy, registered in the name of Ministry for Railway and Maritime Transportation, a department of the Royal Italian Government charged with affairs of maritime and rail transportation, which has as its head a member of the Italian Cabinet. Second: That the steamship was in the possession of the Italian Government, being manned by a Master, officers and crew employed by and under the direction of the Ministry for Railway and Maritime Transportation and paid by it. Such master, officers and crew were civilians not under the orders of or connected with the Italian naval or military forces, and the vessel was not carried on the roster of the Italian Navy as a naval vessel. Third: That the steamship *Pesaro* was engaged in commercial trade carrying passengers and goods for hire, and in such trade was not functioning in a naval or military capacity, or under the immediate direction of the Department of the Italian Government having to do with naval and military affairs. Fourth: That the letter (the substance of which, so far as necessary, is given in a note below, *a*) of Advocatto Francisco

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a "1. Question. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

Answer. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are, therefore,

Montefredini, dated June 21, 1920, may be read by either party on the trial of the issues raised by the libel and the special claim and plea in abatement as the evidence of Francisco Montefredini with the same force and effect as if he had testified in accordance with the said letter; subject, however, to objection by either party to the case as to the materiality, relevancy or competency of the matters referred to in the said letter, or any of them.

The Supreme Court has recently intimated that it considered the question whether the ship of a foreign government used and operated by it as a merchant vessel, is, when within the waters of the United States, immune from arrest in admiralty, as "important and also new" and that the "proper solution is not plain but debatable." *In re Hussein Lufti Bey,* decided June 6, 1921. *In re Muir,* 255 U. S. , decided January 17, 1921. For that reason a re-examination of this question would seem to be justified, if not required, notwithstand-

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subject to arrest, but always on the authority of the President of the Tribunal.

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The U. S. S. B. steamers are subject to arrest, as above, only because they are merchant vessels, as according to the Italian law there is no difference between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

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4. Question. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

Answer. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest.

This was simply a legal point, and the steamer was immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest."

ing the decision in this Court in *The Maipo*, 252 Fed., 627; 259 Fed., 367, and the views expressed by the Circuit Court of Appeals in the *Carlo Poma*, 259 Fed., 369, especially as the decree in the latter case was vacated by the Supreme Court for want of jurisdiction in the Court of Appeals, decided February 28, 1921.

The general principle of the immunity of a sovereign state from suit without its express consent is too deeply imbedded in our law to be uprooted by judicial decision. See *Ex parte, In the Matter of the State of New York, Edward S. Walsh, Superintendent*, U. S. Sup. Ct., June 1, 1921. While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty (see dissenting opinion of Justice Gray in *U. S.* v. *Lee*, 106 U. S., 196), the extent to which it has been carried or retained in modern law has been the subject of strong criticism (*Story, J.*, in *U. S.* v. *Wilder*, 3 Sumner, 308; *Laski, The Responsibility of the State in England*, 32 Harvard Law Review, 447; *Maguire, State Liability for Tort*, 30 Harvard Law Review, 20; cf. *Lord, Admiralty Claims Against the Government*, 19 Col. L. R., 467; *Weston, Actions Against the Property of Sovereigns*, 32 Harvard Law Review, 266), and there is observable a tendency to restrict its application or to guard against its extension (*U. S.* v. *Lee, supra; cf. South Carolina* v. *U. S.*, 199 U. S., 437).

Where the application of the doctrine is not clear, a solution is not to be found by reference to strict *Austinian* theory which assumes, by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from

suit may or may not justify the extension of the principle in modern law. In dealing with admiralty causes, historical or theoretical conceptions peculiar to the common law, must not be assumed to be a part of the maritime law of nations.

In attempting to solve a confessedly new and unsettled problem, the Court, while conforming its decision to certain norms or standards evolved from within the legal system, should not determine the application of these standards solely by logic. It may have to choose between competing judicial analogies and parallel trends of juristic thought; its conclusions should, if possible, conform to the practical ends of the law in a moving, working world.

So in dealing with an unsettled problem in the application of sovereign immunity, the Court must not only consider history and logic; it must also look behind and beyond both and inquire whether the public interests justify or require an extension of sovereign exemption from the usual processes of judicial justice. With the growth and development of state activity, it behooves the Court to consider the consequences which would flow from a ruling removing from the ordinary judicial administration matters of vital importance to the community, which have for centuries been handled through the regular judicial processes.

The question of the exemption from attachment of a ship of a friendly sovereign first arose in our Courts in the case of *The Exchange*, 7 Cranch., 117. It concerned a public foreign ship of war. Bynkershoek had stirred the question whether any ship was immune from seizure, having laid it down as a general proposition that the property of a for-

eign sovereign was not exempt from attachment (*De Foro Legatorum,* Ch. IV.). Marshall, C. J., pointed out that "the jurisdiction of the nation within its own territory was necessarily exclusive and absolute and susceptible of no limitation not imposed by itself. * * * All exceptions to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. * * * This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage. * * * One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Marshall consequently concluded as a principle of public law that ships of war entering the port of a friendly power, open to their reception, are to be considered by the consent of that power as exempt from its jurisdiction.

While the Court had no occasion to consider the case of a public ship used for trading purposes, Marshall (p. 145), pointed out "a manifest distinction between the private property of the person who happens to be a prince and the military force which supports the sovereign power and maintains the dignity and independence of a nation. A prince by acquiring private property in a foreign country may possibly be considered as subjecting that property to the territorial jurisdiction; he may be

considered as so far laying down the prince and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his crown, and the nation he is entrusted to govern."

While Marshall was probably referring to the private property of a prince as a private person, it is interesting to note the similarity of his language to that employed by him in the case of a state engaging in a commercial undertaking. In *The Bank of U. S.* v. *Planters' Bank of Georgia,* 9 Wheaton, 904, he said: "It is, we think, a sound principle that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character and takes that of a private citizen. Instead of communicating to the company its privileges and prerogatives, it descends to a level with those with whom it associates and to the business which is to be transacted." *b.* See also *Bank of Kentucky* v. *Wister,* 2 Peter, 318; *Briscoe* v. *Bank of Kentucky,* 11 Peter, 256, 323; *Louisville R. R.* v. *Letson,* 2 How. 497, 550; *Curran* v. *Ark,* 15 How., 304, 308; *Panama R. R.* v. *Curran,* 256 Fed., 772; *Lord & Burnham* v. *U. S. S. B., E. F. C.,* 265 Fed., 955, 957.

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b Compare the remarks of Lord Stowell in The Swift, 1 Dodo, 320, 339: "The utmost that I can venture to admit is that, if the King traded, as some sovereigns do, he might fall within the operation of these statutes. Some sovereigns have a monopoly of certain commodities, in which they traffick; and, if the King of England so possessed and so exercised any monopoly, I am not prepared to say that he must not conform his traffick to the general rules by which all trade is regulated. But the present question is—is this distribution of the public stores for the public use, a trading within the view of the statute. Looking to authority, as well as principle, and to the public convenience, I conceive, it is not."

In *U. S.* v. *Wilder,* 3 Sumner, 308, 315-317, Mr. Justice Story apparently was of the opinion that a government-owned merchant vessel might not be entitled to the same privileges and immunities as a ship of war. He said:

> "A distinction was taken in that case (The Prins Frederik, 2 Dod., R. 451), which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things extra commercium et quorum non est commercium. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronae,* and not to be applicable to common property of the sovereign of a commercial character or engaged in the common business of commerce. * * *
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> In the case of *The Schooner Exchange* (7 Cranch., R. 116), it was considered by the Court that the ground of exemption of the ships of war of a foreign sovereign coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided that the other property of a foreign sovereign, not belonging to his military or navy establishment, was entitled to a similar exemption. Bynkershoek seems, indeed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable, in the courts of another sovereign, where they are found, to be attached for his debts. His own government, in a case of that sort, released the property. Bynkershoek has the support of other jurists in favor of his opinion at least to the extent of their common private property, found in the foreign territory. But it is not necessary to consider this point further,

as there may be a clear distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel (B. 2, S. 213) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules, as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the U. S., in the case of *U. S.* v. *Barker,* 12 Wheaton R. 599. Vattel has added in the same place: 'If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment which ought to be conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states that are civilized and governed by laws.' (Vattel, B. 2, S. 213.) I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice; and the several states of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show that it is the duty of the sovereign to fulfill all his obligations, whether founded in contract or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice."

U. S. v. *Wilder,* it is true, is not a direct authority for the proposition here in question. The decision in that case was simply to the effect that government-owned cargoes not in the possession of the government could be withheld by virtue of a maritime lien arising from the obligation of the

cargo to contribute in general average. In *The Davis,* 10 Wall, 15, the Supreme Court went a step further and held that such cargoes could not only be retained without judicial process by the ship owner but could be libeled in admiralty by salvors seeking to enforce their lien against ship and cargo. See to the same effect *Johnson Lighterage Co.,* 231 Fed., 365. But cf. *The Fidelity,* 16 Blatchf., 569; 8 Fed Cases, 4758. Similarly, in *Long* v. *Tampico,* 16 Fed., 491, revenue cutters belonging to the Mexican Government but not yet delivered into her possession were held subject to libel for salvage services. On the same principle, a requisitioned vessel manned and operated for the Italian Government by her owners was held subject to attachment in *The Attualita,* 238 Fed., 909.

On the other hand, in *Briggs* v. *The Light Boats,* 11 Allen, 157, in an able and exhaustive opinion which has frequently been referred to by the Supreme Court, Judge Gray held that immunity of public ships was not restricted to ships of war; that "the exemption of a public ship of war of a foreign government from the jurisdiction of our courts depends rather upon its public than upon its military character"; that, in consequence, lightships belonging to and in the possession of the United States could not be attached to secure the enforcement of a mechanic's lien. It should be remembered, however, that the case did not arise in admiralty and the actual decision does not go beyond that of the Supreme Court in *Ex parte. In the Matter of the State of New York, et al., owners of the steam tug Queen City,* decided June 1, 1921, in which the question of the

immunity of a public trading vessel from a libel *in rem* was expressly reserved. In *Mason* v. *Intercolonial Railway,* 197 Mass., 349, the Massachusetts Court, relying upon *Briggs* v. *The Light Boats, supra,* held that funds belonging to the Canadian State Railway were not subject to attachment under state law by trustee process.

The English courts grant exemption to a merchant vessel owned and operated by a sovereign state even in admiralty. Sir Robert Phillimore, in the *Charkieh,* L. R. 4, A and E., 59, and in the *Parlement Belge,* 4 Probate Div., 129, after a careful examination of the authorities and a comparison of the civil law on the subject, came to the conclusion that the exemption of a public ship from seizure did not extend to a vessel engaged in commerce, whose owner was (to use the expression of Bynkershoek) *strenue mercatorem agens:* But, in the latter case, on appeal (5 Prob. Div., 197), Sir Robert's opinion was not sustained. The Court of Appeals found that the carrying of passengers and merchandise had been subordinated to the duty of carrying the mails and that the mere fact that the *Parlement Belge* had been subordinately and partially used for trading purposes did not take away its general immunity, even if an action *in rem* were deemed to be a proceeding solely against the property, and not a procedure directly or indirectly impleading the owner of the property to answer the judgment of the Court. It was careful, however, to point out that in its opinion the owner was indirectly impleaded. Taking this dictum as a starting point, the English admiralty courts by successive decisions have come to recognize that all government-owned ships, whether used for military, political or commercial

purposes, are in time of peace, as well as of war, immune from seizure. *Young* v. *Scotia*, 1903 A. C., 501 (Ferryboat used as part of Canadian state railways); *The Jassy*, 1906 Prob. Div., 270 (Merchant vessel used as part of Roumanian state railways); *The Broadmayne*, 1916 Prob. Div., 64 (requisitioned vessel operated in government service by private owner); *The Gagara*, 1919 Prob. Div., 95; *Porto Alexandre*, 1920 Prob. Div., 30 (Merchant vessels owned and operated by friendly sovereign states).

The basis of these decisions is almost exclusively the authority of the *Parlement Belge, supra*. In *Porto Alexandre*, the great difficulties involved in granting an immunity so extensive were pressed upon the Court; but it felt bound by authority. Lord Justice Scrutton expressed the view that these practical difficulties must "be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the principles of international courtesy which govern the relations between independent sovereign states."

The question, however, is whether international courtesy does or does not require this immunity to friendly foreign states, particularly if the immunity does not exist in favor of the sovereign's own similar interests in his own courts. Certainly there appears to be no consensus of opinion among international jurists to this effect. See *Wheaton International Law*, edited by Coleman Philipson (1916), p. 161; also 12 *Revue Generale de Droit International Public* (1905), p. 143. While the French Court of Appeal at Rennes held a merchantman owned by the British Government carry-

ing wheat and wool for the Allied Governments immune from seizure, it took occasion to point out that the vessel was being utilized "with an object of political interest for the need of national defense, apart from all idea of gain and speculation." More recent decisions of inferior French tribunals, following the English precedents in declining jurisdiction over public vessels employed in commercial service, have been adversely criticised. *Journal de la Marine Merchande,* February 3, 1921.

From the evidence before me it would appear that the Italian Courts refuse to grant immunity in such cases. In Section 9 of the Shipping Act, Congress expressly declared that vessels purchased from the Shipping Board, while employed solely as merchant vessels, shall be subject to the laws, regulations and liabilities governing merchant vessels; and even during the war emergency, this section was broadly construed by the Supreme Court. *The Lake Monroe,* 250 U. S., 246. Since then, the method of enforcing the liability of our public merchant vessels has been changed by the Suits in Admiralty Act so that the ships cannot and need not be arrested or detained, but the nature of their liability remains unchanged and is enforceable in the courts. Certainly then the exercise of jurisdiction by the courts in the case of public merchantmen cannot today be considered novel or revolutionary. The executive branch of our government, it may be assumed, will not be slow to bring to the attention of the judiciary by appropriate suggestion any matter of international courtesy or concern. The failure of our State Department to take any action in these cases is not

without significance, c (*Hearings before Committee on Judiciary in H. R. 7124, Suits in Admiralty Act*, 66th Congress, 1st Sess., August 26, 1919, p. 38), although I do not mean to say that immunity should be refused in a clear case simply because the executive branch had failed to act.

The English decisions above mentioned seem to proceed on the principle that a ship cannot be libelled *in rem* where the owner cannot under the common law be impleaded *in personam*. This doctrine, so far as effective, would appear to be peculiar to English admiralty and is not accepted as a part of the maritime law in this and other countries. As Justice Gray stated in *Homer Ramsdell Co.* v. *Com. Gen. Trans.*, 182 U. S., 406, 413, a case involving the liability of a ship for negligence of a compulsory pilot: "There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall, 53; *Ralli* v. *Troop* (1894), 157 U. S., 386, 402, 420; *The John G. Stevens* (1898), 170 U. S., 113, 120-122; *The Barnstable* (1901), 181 U. S., 464." See *The Maria*, 1 W. Rob, 95, 106, *The*

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c In answer to my inquiry, the Secretary of State, through the Solicitor for the State Department, stated on August 2, 1921:

"It is the view of the Department that government-owned merchant vessels or vessels under requisition of governments whose flag they fly employed in commerce should not be regarded as entitled to the immunities accorded public vesels of war. The Department has not claimed immunity for American vessels of this character. In cases of private litigation in American ports involving merchant vessels owned by foreign governments, the Department has made it a practice carefully to refrain from taking any action which might constitute an interference by the authorities of this Government in such litigation."

Halley, L. R. 2 P. C., 193, 201. Lord Stowell, in *Neptune II,* 1 Dod., 467, had earlier laid down the rule as to the ship's responsibility for the acts of its pilots in accordance with the general maritime law. And it is perhaps no mere accident that Sir Robert Phillimore, whose views on the maritime law were rejected by the common law judges sitting in the Court of Appeals in the case of the *Parlement Belge, supra,* happened to differ from the Privy Council in the case of *The Halley,* L. R. 2 Ad. & Ec. 3.

It is also important to note that in the *Siren,* 7 Wall, 152, the Supreme Court recognized that a ship in the possession of the government might be held to respond in damages for the negligence of its officers resulting in a collision where the government brought the ship into court to be adjudicated as a prize. It would seem that even the English Courts have gone so far as to apply the doctrine of *respondeat superior* to a public ship in admiralty where the government consents to the suit. *The Athol,* 1 W. Rob., 374, 382. The procedural bar removed, it would appear that even a tort liability may in some instances at least be imposed upon a ship owned and operated by the government, notwithstanding the fact that the government could not, on common law principles, be impleaded in the court of claims on the basis of such a complaint (cf. also *Workman* v. *N. Y.,* 179 U. S., 570). In this connection, the words of Judge Story in *U. S.* v. *Wilder,* 3 Sumner, 308, 312, are important: "It is said that in cases where the United States are a party, no remedy by suit lies against them for contribution; and hence the conclusion is deduced that there can be no remedy

in rem. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance that no suit would lie against the United States, in its sovereign capacity, would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist."

Whatever may be the common law or the civil law on the subject and it is not necessary to go into that question here, it should be remembered that the responsibility of a ship in admiralty is not derived from either. It had its sources, as has been frequently pointed out, in the commercial usages and jurisprudence of the middle ages, and earlier. Originally, the primary liability was upon the vessel; that of the owner was not personal but incidental to her ownership; from this, he was discharged either by the loss of the vessel or by abandoning her to creditors. *The China,* 7 Wall, 53, 68; *The Barnstable,* 181 U. S., 464, 467. If, as I believe, sound principles of admiralty jurisprudence require that a ship be treated as an entity separate and distinct from her owner, the immunity of a public ship should depend primarily not upon her ownership but upon the nature of the service in which she is engaged and the purpose for which she is employed. That is a distinction or standard towards which Bynkershoek, Marshall and Stowell tended and in favor of which there is not only the specific authority of Story and Phillimore but the force of judicial analogy and the requirements of modern economic life.

If the *Pesaro* is not immune from seizure by reason of her government ownership, it would seem

clear that she could not claim exemption from attachment on account of the merchant service in which she was engaged. While in *The Davis,* 10 Wall., 15; *Long* v. *Tampico,* 16 Fed., 491, and *The Attualita,* 238 Fed., 909, the lack of possession by the government was stressed as of vital importance, in my judgment, such possession is not the exclusive criterion. Since, apart from the question of possible immunity by reason of government ownership, it is generally recognized that wtihout treaty provisions, merchant ships are not exempt from seizure by reason of their employment in the postal service (*Bonfils, Manuel de droit International,* 7th Ed., 1914, Sec. 629), immunity should not be given vessels owned and employed by the government in ordinary times in the usual channels of trade. To deprive parties injured in the ordinary course of trade of their common and well established legal remedies would not only work great hardship on them, but in the long run it would operate to the disadvantage and detriment of those in whose favor the immunity might be granted. Shippers would hesitate to trade with government ships, and salvors would run few risks to save the property of friendly sovereigns, if they were denied recourse to our own courts and left to prosecute their claims in foreign tribunals in distant lands. See *Hearings before Committee on Judiciary on H. R.* 7124 (Suits in Admiralty Act), 66th Congress, 1st Session, August 26, 1919, pp. 32 and 45. The attachment of public trading vessels, in my judgment, is not incompatible with the public interests of any nation or with the respect and deference due a foreign power.

In many phases of our law today it becomes necessary to distinguish between those cases in which it is, and those cases in which it is not, consistent with the public needs and interests to subject the state, its agencies and properties to the ordinary processes of the law. True it is that in certain cases, involving historic functions of the state, the law is too well settled to admit of doubt or of any nice balancing of interests to determine whether or not judicial processes may be evoked. But where the law cannot be said to be plainly settled, it becomes the duty of the court to determine whether or not the public needs militate against the enforcement through the appropriate judicial channels of the ordinary rules of justice.

The question is not merely whether the function in issue is governmental or private; it is doubtful whether any activity of the state may properly be called private. The public service functions of the state today may be as important in their bearing and as public in their character as the more limited functions to which it was the custom of the state to confine itself a century ago. In developing this field of law, expressions used by the courts have often been inept and inaccurate; the distinctions drawn in specific cases specious and negligible. Yet a sound principle, though at times, perhaps dimly discerned and mistakenly applied, underlies the cases. The principle is developing in the field of municipal corporations. *City of Los Angeles* v. *Los Angeles Gas Corporation,* 251 U. S., 32. The principle also finds application in the delimitation of the sphere in which the instrumentalities of a state are immune under our constitution from federal taxation. *South Carolina*

v. *U. S.*, 199 U. S., 437. While these cases involve the question of substantive liability rather than procedural immunity, the analogy is none the less pertinent; in my opinion, a government ship should not be immune from seizure as such, but only by reason of the nature of the service in which she is engaged.

And as the *Pesaro* was employed as an ordinary merchant vessel for commercial purposes at a time when no emergency existed or was declared, she should not be immune from arrest in admiralty, especially as no exemption has been claimed for her, by reason of her sovereign or political character, through the official channels of the United States.

But if I err in believing that the accepted law of this country does not require a holding that merchant vessels owned and operated as such by a foreign sovereign state are, therefore, exempt from seizure, the *Pesaro* would, nevertheless, not be entitled to immunity.

I do not base this upon the fact that ships owned and operated for commercial purposes by the United States would not be exempt from ordinary process under Italian law, for retaliation and reprisal are for the executive branches of our government and not for the courts. *The Nereide,* 9 Cranch, 388, 422; *Bank of Augusta* v. *Earle,* 13 Pet., 519, 589; *Beale I Conflicts of Law,* Part 1, p. 103. The doctrine of reciprocity in *Hilton* v. *Guyot,* 159 U. S., 113, should not be extended to a case involving the very jurisdiction of the court.

But the fact that the steamship *Pesaro* itself is subject to the ordinary processes of the Italian Court would seem to be vital and decisive. There

is no reason of international comity or courtesy which requires that Italian property not deemed *extra commercium* in Italy, should be treated as *res publica* and *extra commercium* in the United States. In *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheaton, 904, Chief Justiec Marshall said: "The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of sovereign character, so far as respects the transactions of the bank and waives all privileges of that character. * * * We think that the Planters' Bank of Georgia is not exempted from being sued in the Federal Courts, by the circumstance that the state is an incorporator." So it may be said here that the Italian Government, by giving to the *Pesaro* the capacity to be sued in the Italian Courts, voluntarily strips the *Pesaro* of its sovereign character and waives all privileges of that character; and that therefore the *Pesaro* is not exempt from suit in the United States, by reason of its governmental ownership and operation. For if a libel can be maintained against the steamship *Pesaro* in the Courts of Italy, it is difficult to see why our tribunals should decline jurisdiction: there is less reason therefor in a case of this sort than in *The Belgenland*, 114 U. S., 355.

October 1, 1921.

JULIAN W. MACK,
U. S. C. J.

SUPPLEMENTAL OPINION.

MACK, *Circuit Judge:*

My attention has been directed, and I have given further consideration to some of the Continental authorities on the subject. There is, as has already been indicated, much difference of opinion among the European jurists as to the extent of the immunity to be accorded foreign sovereign states. Conservative opinion seems to favor the non-suability of foreign sovereign states in practically all cases. See *Loening, Die Gerichtsbarkeit uber fremde Staaten und Souveräne,* 1903; v. *Dynovsky, Unzulaessigkeit einer Zwangsvollstreckung gegen auslaendische Staaten; Van Praag, Jurisdiction et Droit International,* 1915, pp. 340-405. But some of the most eminent jurists have vigorously opposed according immunity from judicial process to foreign states in matters not affecting their political or sovereign rights. *Fiore, Nouveau Droit International,* No. 500 ff.; *Von Bar, Annuaire de l'Institut de Droit International,* Vol. XI, p. 414 ff.; *Laurent, Le Droit Civil International,* Vol. III, pp. 74-89; *Despagnet, Droit International Privé,* no. 179; *Weiss, Traité de Droit International Privé,* 2d Ed., Vol. V, pp. 85-115; *Baudry-Lacantinerie et Houques Fourcade, Droit Civil, Des Personnes,* Vol. 1, no. 657; *DeLapradelle, 1910 Darras-DeLapradelle* (*Revue de Droit International Privé*), Vol. VI, p. 779. The Institute of International Law at its conference at Hamburg in 1891 adopted a number of resolutions proposed in the report of Von Bar with reference to actions against foreign states. Among those actions recognized by the Institute as properly maintainable against a

foreign sovereign state were: "Les actions qui se rapportent à un établissement de commerce ou industriel ou à un chemin de fer exploité par l'etat dans le territoire; * * * Les actions en dommages—intérêts nées d'un quasi-délit, qui a eu lieu sur le territoire (*Annuaire de l'Institut de Droit International,* Vol. XI, p. 436)." The suability of a merchant vessel owned and operated by a foreign state would apparently fall within the principles, if not the literal rules, formulated by the Institute. These principles were recognized to some extent in the Treaty of Peace with Germany, Article 289 of which provided: "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges or immunities of sovereignty."

There seems to be quite a conflict of views in the actual jurisprudence of European countries in this matter. *Walton, State Immunity in the Laws of England, France, Italy and Belgium, Journal of Comparative Legislation and International Law,* October 1920 (Third Series, Vol. II, Part I, p. 252); *Van Praag,* op. cit., pp. 400-407. The German decisions have tended to accord foreign sovereign states virtually complete immunity. *Von Hellfield* v. *Russian Government* (*Anhalt Case*); *In the Royal Prussian Court for the Determination of Jurisdictional Conflicts,* 1910 (reported in full, 5 *American Journal of International Law,* 490); *Salling* v. *U. S. Shipping Board* (*S. S. Ice King*), *Hanseatische Gerichtszeitung* (*Hauptblatt*), 1921, p. 85, p. 110. The French jurisprudence, as has already been indicated, looks in the same direction. *Lambiege & Pujol* v. *Spanish Government,* 1849, *Dalloz* I, 5; *The Englewood, Clunet,* 1920, p. 621, and *Darras-DeLapradelle,* 1921, p. 74. But see,

Lakkowsky v. *Office Suisse, Darras-DeLapradelle,* 1921, p. 70. It is possible that both the French and German Courts have felt that analogous actions brought against their own Governments would, in the absence of statutory enactment, more naturally under their system of law, come under the purview of their administrative tribunals, which, of course, could not entertain complaints against foreign states, and they consequently may have seen some embarrassment and difficulty in subjecting foreign states to tribunals incompetent to act against their own Governments. If this be true, it only emphasizes the desirability of keeping the admiralty rules so far as possible free from the peculiarities of local law and jurisprudence. It is unnecessary here to consider how the somewhat similar problem that arises where a foreign state engages in a commercial undertaking, such as the operation of a railway, within the jurisdiction of another state, should be dealt with. The Italian tribunals (*Clunet,* 1888, p. 289; *Clunet,* 1889, p. 335; *Darras-DeLapradelle,* 1906, p. 527) and also the Swiss (*Dryfus* v. *Austrian Ministry of Finance, Darras-DeLapradelle,* 1918, p. 172) go very far in holding foreign states subject to their jurisdiction whenever the foreign states are acting, as it is phrased, not in a sovereign or political capacity (*jure imperii*), but as subjects of civil rights (*jure gestionis*). The Belgian jurisprudence is in accord with that of Switzerland and Italy as to the power of the courts to assume jurisdiction and give judgment, but doubt is cast on the power of the courts to attach or levy execution against the property of a foreign state. *Liege & Luxemberg Ry.* v. *The Netherlands, Clunet,* 1904, p. 417; *Ottoman Government* v. *Gaspary and Slioberg, Pasicrisie Belge,*

1911, p. 104. The doubt raised may be a source of difficulty in some cases; but where, as here, a specific claim arising in the ordinary course of trade is asserted against property employed for commercial purposes, which, if in the possession of a public service corporation, would be subject to seizure, there seems little reason against enforcing, by detention, and if need be sale, of such property of a foreign state, a judgment reached by those judicial processes which are recognized in all civilized countries as binding between individuals and corporations. In countries where declaratory judgments are authorized, such judgments might be of some value even though there were no power of compulsory execution. But the enforcement of such judgments only through resort to distant foreign lands or through the delicate medium of diplomatic representations, would fail adequately to serve the needs of modern economic life. These should indeed yield to the greater need of peaceful and harmonious international relations, but it seems improbable that in these days the judicial seizure of a publicly owned merchantman like the PESARO would affect our foreign relations in any greater degree than the judicial seizure of a great privately owned merchantman like the Aquitania. Indeed it would seem that foreign relations are much less likely to be disturbed if the rights and obligations of foreign states growing out of their ordinary civil transactions were dealt with by the established rules of law, than if they were made a matter of diplomatic concern.

I have not attempted to discuss many points of distinction involved in the European jurisprudence and doctrine, but my examination of the foreign

law, such as it was, has served to strengthen the conclusion heretofore announced in these cases.

December 13, 1921.

(Sgd.) JULIAN W. MACK,
U. S. Circuit Judge.

It would be a strange anomaly if the ships in effect owned by the American Government through the agency of the Emergency Fleet Corporation might be liable in our courts (*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation,* decided by this court May 1, 1922), as well as in the courts of each other nation, and yet a foreign government which does not undertake to organize a corporation as its agency could be held immune while engaging in similar practices.

POINT III.

The decrees should be affirmed, with costs.

Dated, September 21, 1922.

Respectfully submitted,

CELLER & KRAUSHAAR,
Proctors for Libelant-Appellee.

MEYER KRAUSHAAR,
EMANUEL CELLER,
of Counsel.

INDEX.

	PAGE
Index of Authorities	ii
Statement	2
1. Nature of the litigation	2
2. The facts	3
3. The pleadings	3
4. The proceedings in the District Court	7
5. The appeals	8
6. Questions involved	9
First Point. The District Court has jurisdiction of the subject matter of these suits, and of the vessel and of the person of the respondent, and the Circuit Court of Appeals was right in affirming the decrees in favor of the libelant	10
Second Point. There is not any proof in the case regarding the governmental nature of the ownership of the steamships *Murmugao* and *Cunene*, consequently a large part of the argument in the petitioner's brief is entirely irrelevant	23
Third Point. The litigation in these suits has been continued by the owner of the vessels admittedly for purposes of delay	26
Fourth Point. The motions to dismiss or affirm	28
Last Point. The writ of certiorari should be dismissed, or the orders of the Circuit Court of Appeals for the Second Circuit should be affirmed	27

INDEX OF AUTHORITIES.

	Page
Atlantic Transport Co. *v.* Imbrovek (1914) 234 U. S. 52	12
Brewing Co. *v.* McElligott (S. D. N. Y. 1919) 259 Fed. 321	19
Clark *v.* Barnard (1882), 108 U. S. 436, 447	16, 18
Cooper *v.* Reynolds (1870), 10 Wall. 308	11
Carlo Poma, The (1920), 255 U. S. 219	22
Ex Parte Hussein Lufti Bey (1921), 256 U. S. 616	23
Ex Parte Muir (1920), 254 U. S. 520	22, 23
Farrar & Brown *v.* U. S. (1830), 3 Pet. 488	16
Gunter *v.* Atlantic Coast Line (1905), 200 U. S. 273	19
Luckenbach *v.* Pearce (C. C. A. 5th C. 1914), 212 Fed. 387	12
Mighell *v.* Sultan of Johore (1894), 1, Q. B., 149, 160, 162	16, 18
Pesaro, The (1920), 255 U. S. 216	22
Porto Rico *v.* Ramos (1913), 232 U. S. 627	20
Richardson *v.* Fajardo Sugar Co., 241 U. S. 44	7, 19
Rupert City, The (D. C. Wash. 1914), 213 Fed. 263	12
State Industrial Commission *v.* Nordenholt Corp., U. S. Sup. Crt., Oct. Term 1921, No. 625, decided May 29, 1922	12
Seguranca, The (S. D. N. Y. 1893), 58 Fed. 908	12
United States *v.* Central Nat. Bank (1882), 10 Fed. 612, 615; 137 U. S. 355	21
Workman *v.* New York City (1900), 179 U. S. 552	14

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

TIETJEN & LANG DRYDOCK COMPANY,
Libelant-Appellee,

against

The Steamship "SAO VICENTE", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

No. 279.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libelant-Appellee,

against

The Steamship "MURMUGAO," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant,

No. 280.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY, Libelant-Appellee, *against* TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	No. 281.
THOMAS DE SIMONE, Libelant-Appellee, *against* The Steamship "MURMUGAO", her engines, etc., TRANSPORTES MARITIMOS DO ESTADO, Claimant-Appellant.	No. 282.
THOMAS DE SIMONE, Libelant-Appellee, *against* TRANSPORTES MARITIMOS DO ESTADO, Respondent-Appellant.	No. 283.

BRIEF FOR MAXWELL ROSE.

STATEMENT.

1. *The nature of the litigation.*

These five suits were brought in admiralty on claims for services rendered, and supplies, materials and labor

furnished, to the steamships *Sao Vicente, Murmugao* and *Cunene,* owned by Transportes Maritimos do Estado.

The amounts involved in the five suits, including interest, total more than $175,000.

In the two suits brought by Maxwell Rose, the total amount due, including interest, is over $56,800. *Record,* pp. 87, 143.

It is not disputed that the damages referred to, which were awarded under the decrees of the District Court, are due and owing to the libelants-respondents, under the claims set forth in the original libels.

2. *The facts.*

During July, August and September, 1920, Maxwell Rose furnished stevedoring services to the steamships *Murmugao* and *Cunene* at the port of New York, at the request of the agents and persons who had charge of the steamships, and in reliance upon the credit of the said vessels.

It has been admitted that the said stevedoring services were rendered at the request of "The then agents" of the said steamships. *Record,* pp. 46, 108.

After the services had been rendered, Rose presented his bills to the masters and agents of the vessels, and the bills were approved by them, the masters signing the bills against their respective ships, as indication of their approval. *Record,* pp. 55, 56, 116.

3. *The pleadings.*

Not having been able to obtain payment of his bills, Rose filed two libels in admiralty.

For the services rendered to the *Murmugao,* a libel was filed against that vessel *in rem;* and as she was then at New York, process of arrest was issued in accordance with the usual admiralty practice, and the vessel was seized by the United States marshal. *Record,* p. 45.

For the services rendered to the *Cunene,* the libel was filed *in personam* against Transportes Martimos do Estado, a foreign corporation, and the owner of the two vessels; and, in accordance with the admiralty practice, inasmuch as the owner could not be found within the district, process of foreign attachment was issued against the steamship *Murmugao,* and she was seized by the United States marshal in that suit. *Record,* p. 106.

The jurisdiction of the court, and the writs under which the Murmugao was arrested in the two suits, were not challenged.

On the contrary, in the suit against the *Murmugao in rem,* the owner filed a claim in the usual admiralty form through its agent. *Motion to Dismiss or Affirm, Schedule A,* pages 25-27; and also filed the usual stipulations for costs and value, required by the rules of the court. *Motion to Dismiss or Affirm, Schedules C-1, C-2,* pages 26-31.

In the suit *in personam,* the owner, appearing by its proctor, filed *a general appearance,* accompanied by the usual bond for costs, a claim executed on behalf of the owner by its agent, and a bond discharging the attachment. *Motion to Dismiss or Affirm, Schedules B, D-1, B-2, and D-2,* pages 33-40.

On the filing of the claims, bonds and appearances, the jurisdiction of the court over the steamship *Murmugao,* and over the person of her owner, was completed, and the steamship was released from the custody of the marshal.

Neither the claims, nor the general appearance in the *in personam* suit, nor any of the stipulations for costs and value in the two suits contained any reservation whatsoever as to the jurisdiction of the court.

In both suits, the bonds or stipulations for value were executed by Transportes Maritimos do Estado, signing by the Acting Consul General of Portugal at New York; and they were also signed by the American Surety Co., a corporation of the State of New York, as surety.

In each instance, the said stipulators agreed that they would "*abide by all the orders of the court,* interloctuory or final, *and pay the amount awarded by the final decree* rendered by this court, or by any appellate court, if an appeal intervene, with interest." *Motion to Dismiss or Affirm,* pages 29, 38.

Some three weeks after the vessel had been released by the filing of the general appearance, claims and stipulations referred to, an answer was filed in each suit, admitting that the services had been rendered, and the supplies, etc., had been furnished to the *Murmugao* and *Cunene* by Maxwell Rose, at the request of the then agents for the vessel. *Record,* pp. 46, 108.

Each answer, as an alleged separate defense, contained the following clauses:

"1. That the steamship *Murmugao* is a Portuguese vessel flying the flag of Portugal and is owned and operated by Transportes Maritimos do Estado, which is a department of the sovereign foreign government of Portugal, a government now at peace with the United States and allied with the United States in the late world war, and that the matters set forth in said libel relate to the management of said vessel outside the jurisdiction of the United States, and, in accordance with the provisions of the Merchants' Shipping Acts and international comity, the settlement of these matters should be left to the Portuguese Consul at the Port of New York.

2. Respondent objects and protests to the assumption of jurisdiction by this Court, and alleges that it is a vessel owned and operated by the sovereign foreign government of Portugal as aforesaid and that it cannot be sued in the Courts of the United States without its consent."

These answers were filed in the name of Transportes Maritimos do Estado.

They were verified by the acting Consul General for the Government of Portugal in the following form:

"The respondent, *as I am informed and believe,* is owned and operated by the Transportes Maritimos do Estado, a department of the Republic of Portugal, a sovereign foreign government. * * * The sources of my information and the grounds for my belief as to the matters stated to be alleged on information and belief are records at the Port of New York *and communications received from the agents of the steamship* * * *". (Italics ours.)

4. *The proceedings in the District Court.*

The answers,—similar in form in each of the five suits,—admitted the justness of the claims, and the fact that payment had not been made; *and contained absolutely no allegation of any defense to the merits.*

Accordingly, exceptions to the answer were filed in each suit by the respective libelants, challenging the right of the owner of the vessels to plead the alleged immunity in the answers as a bar.

The argument of the exceptions was delayed, during negotiations for settlements, which ultimately proved to be abortive.

Finally, the exceptions in the *Tietjen and Lang,* and the *Rose* suits were argued before Judge Knox, who sustained them, saying in his opinion:

> "Be this as it may, as I view the doctrine of immunity of a sovereign from suits such as these, it is not so sacred as to require its application unless the sovereign insists upon its immunity at their inception of a given litigation. The Supreme Court has held in *Richardson* v. *Fajardo Sugar Co.,* 241 U. S. 44, that a government may waive its sovereign attributes, and I hold that in so far as the present respondent possesses only the right of immunity, it has waived the same. * * * So long as a distinction is recognized between general and special appearances, such distinction must be given its logical effect." *Record,* pp. 50, 51; 111, 112.

Judge Manton, in the same court, had previously overruled the similar exceptions in the De Simone suits.

When his attention was directed to Judge Knox's decision, Judge Manton ordered the De Simone suits peremptorily to trial, and during the course of the final hearing, reversed his original ruling, and sustained the exceptions.

As a result of the orders of the District Court sustaining the exceptions to the answers, the only question remaining open in the *Rose* suits was the exact amount of damages due in each suit.

In accordance with the usual practice, the two cases were sent to a special commissioner to hear proof of, and determine the amount of damages recoverable.

Extended references were had before the commissioner, in the course of which the libelant, Rose, established the amount due to him in each case.

Not a single word of testimony was offered by the owner of the ship to rebut or contradict the libelant's testimony.

The commissioner having reported to the court the amount due to the libelant in each suit, his report was confirmed, and final decrees were entered. *Record*, pp. 86, 87; 141-143.

5. *The appeals.*

Upon the entry of the final decrees in all five cases, appeals were taken by Transportes Maritimos do Estado to the United States Circuit Court of Appeals for the Second Circuit.

It will be observed that even in the notices of appeal filed in each case, no mention whatever was made of any interest of the Portuguese Government in the suits. The

notices were all filed in the name of the *Murmugao,* and Transportes Maritimos do Estado. *Record,* pp. 89, 145.

As soon as the records on appeal were filed in the several cases, the several libelants-appellees presented to the Circuit Court of Appeals motions to *dismiss or affirm.*

The motion in the *Tietjen & Lang* case was heard first. That motion was granted, and the appeal was dismissed.

A reargument was allowed the appellant in that case, and, on the statement of appellant's proctor, that the appeals in the *Rose* and *De Simone* suits involved only the same question as that raised in the *Tietjen & Lang* appeal, the motions to *dismiss or affirm* made by Rose and De Simone were adjourned by the court, on the understanding that the decision on the reargument in the *Tietjen and Lang* case should apply also to the other suits.

After the reargument, the Court re-stated its decision dismissing the appeals; and subsequently filed a written opinion setting forth the reasons for its decision. *Record,* pp. 98-102.

6. *The question involved.*

As has been stated, there was not any defense put forward to the merits, or even suggested, by the owner of the vessels in the proceedings in the District Court.

The suits in that court were disposed of on the single question of law, that the alleged bar of immunity *could not be pleaded as a defense in the answers,* after the fil-

ing of a general appearance and a sealed and solemn agreement to abide by the decision of the Court and to pay any judgment or decree which might be entered.

The correctness of the ruling of the District Court *on this one point* was the *only* question raised in the appeals to the Circuit Court of Appeals.

It was on this one question that the Circuit Court of Appeals *dismissed the appeals.*

Therefore it would seem that that is the only question which is brought up for review by this Court under the writ of *certiorari* to the Circuit Court of Appeals for the Second Circuit.

For even if the appeal be construed as a trial *de novo,* the question referred to *is the only question which has ever been raised by the appellant during the litigation.*

FIRST POINT.

THE DISTRICT COURT HAS JURISDICTION OF THE SUBJECT MATTER OF THESE SUITS, AND OF THE VESSEL AND OF THE PERSON OF THE RESPONDENT, AND THE CIRCUIT COURT OF APPEALS WAS RIGHT IN AFFIRMING THE DECREES IN FAVOR OF THE LIBELANT.

Jurisdiction of a Court over a controversy involves the jurisdiction of the Court over—

1. The subject matter of the controversy.
2. The persons and/or property of the litigants

on whose rights the decree of the Court may operate.

Jurisdiction has perhaps been nowhere more clearly defined in the decisions of this Court than in the case of *Cooper* vs. *Reynolds,* 10 Wall, 308 (1870), in which case the question of attachment of property under the Tennessee Code of 1857 to 1858 was involved.

In dealing with the question of jurisdiction, Mr. Justice Miller, in rendering the opinion of the Court in that case, 10 Wall., at page 316 (Italics ours), said:

> "It is as easy to give a general and comprehensive definition of the word jurisdiction as it is difficult to determine, in special cases, the precise conditions on which the right to exercise it depends. This right has reference to the power of the court over the parties, over the subject-matter, over the *res* or property in contest, and to the authority of the court to render the judgment or decree which it assumes to make.
>
> "By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred.
>
> "Jurisdiction of the person is obtained by the service of process, *or by the voluntary appearance of the party in the progress of the cause.*
>
> "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and

extent of the authority vested in it by law in regard to the subject-matter of the cause."

In the present case we have both elements necessary to found the decrees of the Court below.

The actions involved ordinary admiralty claims, which were put forward in the libels. No suggestion to the contrary has ever been raised by the owner of the vessels.

In the two cases on behalf of Maxwell Rose, Nos. 280 to 281, the action was for stevedoring services.

In case No. 280, the services were rendered directly to the steamship *Murmugao,* and constituted a lien under Maritime Law against her. *Record,* p. 44.

In the other case, the services had been rendered to the steamship *Cunene,* owned by the respondent named in that case, the Transportes Maritimos do Estado. *Record,* p. 105.

Thus there is not any question as to the jurisdiction of an admiralty Court of the United States *over the subject matter,* because stevedoring contracts are subject to Maritime jurisdiction. *State Industrial Commission* vs. *Nordenholt Corp.,* October Term 1921 No. 625, decided by this Court on May 29, 1922. *The Seguranca* (S. D., N. Y., 1893), 58 Fed. 908; *Luckenbach* v. *Pearce* (C.C.A. 5th, c. 1914), 212 Fed. 387; *The Rupert City* (D.C., Wash., 1914), 213 Fed. 263; *Atlantic Transport Company* v. *Imbrovek* (1914), 234 U. S. 52.

The steamship *Murmugao* was arrested in the proceeding *in rem,* and attached in the proceeding *in per-*

sonam by writ of foreign attachment, according to admiralty procedure.

There was not any challenge made to these writs at the time when they were levied, but on the contrary the owner of the *Murmugao,* in the *in rem* proceeding, filed a claim in the usual admiralty form, through its agent, *Motion to Dismiss or Affirm, Schedule A, pages 25 to 27;* and it also filed the usual stipulations for costs and value required by the rules of the District Court of the United States for the Southern District of New York, *Motion to Dismiss or Affirm,* Schedules C-1, C-2, pages 26 to 31.

There was not any reservation, or anything in the nature of a special appearance in either the claim or the stipulations; and the stipulation for value, under settled principles of admiralty jurisdiction, became the *res,* and was substituted for the arrested steamship.

In the *in personam* action, there was a general appearance on behalf of Transportes Maritimos do Estado, accompanied by the usual bond for costs, a claim, and a bond discharging the attachment. *Motion to Dismiss or Affirm,* Schedules B, D-1, B-2 and D-2, pages 33 to 40.

By the filing of these claims, appearances and bonds the jurisdiction of the Court was completed *over the steamship Murmugao and the person of her owner.*

By both bonds, *Motion to Dismiss or Affirm, Schedules C-2, pages 29 to 31, and D-2, pages 38 to 40,* the stipulators, who were the Transportes Maritimos do Estado, signing by the acting Consul General of Portugal, and the American Surety Company, a corporation of the State of New York, agreed that they would "*abide by all*

the orders of the Court, interlocutory or final, and pay the amount awarded by the final decree rendered by this Court or by any Appellate Court, if an appeal intervene, with interest."

In the event of such payment the stipulation provided that it was to be void; otherwise it was to remain in full force and virtue.

The same provisions were contained in the stipulations for costs. *Motion to Dismiss or Affirm,* folios 79, 88, 103 and 115.

Thus, there has been substituted in the place and stead of the steamship *Murmugao* and of the Transportes Maritimos do Estado, obligations of an American corporation, the American Surety Company of New York, directly responsive to the decree of the Court, *and the fact that this was done advisedly is shown by the signature of the Acting Consul General of Portugal to the said stipulations.*

There is not, and never has been, any suggestion that the Consul General of Portugal did not have the right to arrange such stipulations and sign them.

In fact, as the commercial representative of the Portuguese Government at New York he must be presumed to have had the power to deal with such emergencies.

The case of *Workman* v. *New York City,* 179 U. S., 552 (1900), gives, in the opinion of the Court, a very interesting statement by Chief Justice White, then an Associate Justice, of the jurisdiction of Admiralty

Courts as affected by claims of Governmental immunity. At page 566 he said:

> "The contention is, although the corporation had general capacity to stand in judgment, and was therefore subject to the process of a court of admiralty, nevertheless the admiralty court would afford no redress against the city for the tort complained of because under the local law the corporation as to some of its administrative acts was entitled to be considered as having a dual capacity, one private, the other public or governmental, and as to all martime wrongs committed in the performance of the latter functions it should be treated by the maritime law as a sovereign. But the maritime law affords no justification for this contention, and no example is found in such law, where one who is subject to suit and amenable to process is allowed to escape liability for the commission of a maritime tort, upon the theory relied upon. We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given. Both of these rules, however, proceed upon the hypothesis of the want of a person or property before the court over whom jurisdiction can be exerted. As a consequence, the doctrine above stated rests not upon the supposed want of

> power in courts of admiralty to redress a wrong committed by one over whom such courts have adequate jurisdiction, but alone on their inability to give redress in a case where jurisdiction over the person or property cannot be exerted. In other words, the distinction between the two classes of cases is that which exists between the refusal of a court to grant relief because it has no jurisdiction to do so, and the failure of a court to afford redress in a case where the wrong is admitted and jurisdictional authority over the wrongdoer is undoubted."

Under the circumstances referred to, there have been no grounds for immunity shown in the present case, and none can be shown.

Immunity, such as that which by international comity is accorded to a foreign sovereign, is only a personal privilege, and the person who has it can waive it. *Clark* v. *Barnard* (1882), 108 U. S. 436, 447; *Mighell* v. *Sultan of Johore*, 1 Q. B. (1894), 149. 160, 162.

It is universally held that immunity is waived by a general appearance.

In the case of *Farrar & Brown* v. *U. S.*, 3 Pet., 458 (1830), Chief Justice Marshall held that the Attorney General of the United States, by a general appearance, cured any defect in the service of process on the United States and that the general rule that such an appearance did cure a defect in process was applicable to the United States as well as to any private litigant. He said at page 458:

"The practice has uniformly been, ever since the seat of government was removed to Washington, for the clerk to enter, at the first term to which any writ of error or appeal is returnable, the appearance of the attorney-general in every case to which the United States are a party, by entering his name on the docket. This practice must have been known to every attorney-general, and has never been objected to. It might be considered, therefore, as having an implied acquiescence on the part of the attorney-general, although it is admitted that there is no evidence of any express assent. We do not say that this practice would be conclusive against the attorney-general, if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity, in the services of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.

"The decisions of this Court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause, therefore, is ordered to be reinstated.

"On consideration of the motion made by the attorney-general, on the part of the defendants-in-error in this cause, to dismiss the writ of error in this cause, on the ground that the citation is made returnable to a day during the vacation, to wit: on the first Monday in January, A. D. 1828, whereas the return day should have been the second Monday in January, A. D. 1828, it is ordered by the Court that, inasmuch as the said defect is cured by the appearance of the attorney-general on the part of the defendant, said motion be and the same is hereby overruled."

In the English case of *Mighell* v. *Sultan of Johore* (1894), 1 Q. B., 149, the Court discussed the question as to how and when the immunity might be waived, and held that it would be waived by an appearance. Lopes, L. J., said at page 161:

> "In my judgment the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, *by appearance to a writ.*" (Italics ours.)

Kay, L. J., said at pages 162, 163:

> "The next point is this. It is said that an independent sovereign may waive his right to immunity and may treat himself as subject to the jurisdiction. I agree; but how is that to be done? * * * The passage cited from Vattel by Lopes, L. J., is emphatic on this very point, and shews that the time at which the immunity is to be waived must be *when an action is brought* against the foreign sovereign. * * * I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless, *upon being sued,* he actively elects to waive his privilege and to submit to the jurisdiction. * * *"

This Court, in its opinion in *Clark* v. *Barnard* (1882), 108 U. S. 436, discussing the same question, held that where a suit was otherwise properly brought, in which a state had sufficient interest to entitled it to become a party defendant, "its appearance in a court of United States would be a voluntary submission to its jurisdiction."

In the case of *Brewing Co.* v. *McElligott* (S. D. N. Y., 1919), 259 Fed. 321, Judge Augustus N. Hand, discussing the rule pointed out that, to be availed of, a claim of immunity must be raised at the outset of the case and before general appearance. He said at page 327:

> "In the case of *Richardson, as Treasurer of Porto Rico* v. *Fajardo Sugar Co.*, 241 U. S. 44, * * * the Treasurer of Porto Rico, who had been sued in the United States District Court for Porto Rico, appeared and answered the complaint, and it was held that under these circumstances it could not deny the court's jurisdiction, because if its sovereignty exempted it from suit, *the exemption would only exist where it challenged the jurisdiction of the court at the outset.* This, I think has been the general rule as to a foreign sovereign or *quasi* sovereign." (Italics ours.)

To the same effect is the decision in *Gunter* v. *Atlantic Coast Line* (1905), 200 U. S. 273.

In the present cases we not only have general appearances, but we also have solemn, formal, sealed agreements in the form of bonds, signed by a consular officer, by which the owner of the steamship *Murmugao* as claimant in suit No. 280, and respondent in suit No. 281, has formally, with a surety, agreed to abide by the orders of the Court.

It is difficult to conceive how a consent to jurisdiction, or a waiver of immunity could be more solemnly and conclusively evidenced; and in the face of such consent and waiver, it is not possible for the steamship *Murmugao* or the respondent, to escape from its liabilities as found by the Court.

In *Porto Rico* v. *Ramos* (1913), 232 U. S. 627, this Court said at page 632:

> "The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view, but the immunity of a sovereignty from suit without its consent, cannot be carried so far as to permit it to reverse the action invoked by it *and to come in and go out of court at its will*, the other party having no right of resistence to either step." (Italics ours.)

The essence of the enforcement of judicial procedure in our Courts is finality in the various steps of litigation and inability of a party to change his mind on a step after he has once taken it.

It is submitted that even a foreign sovereign, assuming that a sovereign is involved in the present case, should not be permitted to fly in and out of Court at its pleasure, like a bat in a belfry.

It is submitted, therefore, that in the present cases the Transportes Maritimos do Estado and its vessels cannot escape from the decrees which have been had against them, and which they have solemnly undertaken to pay.

It may be urged on behalf of the respondents that the exceptions filed to the plea of governmental immunity contained in the answers involved an admission of the governmental status of the steamship *Murmugao* and the steamship *Cunene* and, hence, that the District Court should have allowed the cases to go to trial on that issue, instead of sustaining the exceptions.

The difficulty with this position is that it is a well settled rule of law that an exception to an answer opens up the whole record, *United States* v. *Central Nat. Bank* (1882), 10 Fed. 612, 615; 137 U. S. 355; and the whole record in these cases showed, in each suit, a libel which stated a good cause of action in admiralty, followed by a general appearance, or a general claim, and a general bond agreeing to abide by the jurisdiction of the Court.

That is the reason why the District Court held that immunity had been waived and that interlocutory decrees must be granted, notwithstanding the belated averment of immunity contained in the separate defense of the answer.

The fallacy of the argument set forth in the Third Point of appellant's brief, at page 10, lies in the fact that the appellant apparently deems an appearance and an answer as being one and the same document, and as serving one and the same purpose.

The statement in the same point of appellant's brief that "the subject matter of the action is sovereign property" seems to be entirely incorrect, for clearly the subject matter of these suits is the right of the several libelant-appellees to recover for the services rendered by them.

The suggestion in paragraph 2, at page 15 of appellant's brief, that in these cases a foreign sovereign has been *forced* to submit to the jurisdiction of the court, and the suggestion in the Sixth Point of appellant's brief, page 16, that the decrees of the District Court in these cases are in positive violation of the sovereignty of an

independent foreign sovereign, are, of course, entirely beside the point.

The owner of the vessels was not forced to waive any immunity which might have existed, for certainly the question of immunity could have been raised and preserved by the owner of the vessels through a special appearance. This was done in all of the recent cases in which the question of immunity has come before this court. *The Pesaro* (1920), 255 U. S. 216; *The Carlo Poma* (1920), 255 U. S. 219; *Ex Parte Muir* (1920), 254 U. S. 520.

The suggestion of a violation of sovereignty, and the implication that an affirmance of the decrees of the District Court would furnish a *casus belli*, certainly can have no application to a case where the alleged privilege of immunity has been waived.

Furthermore, as the immunity accorded to a foreign sovereign by international comity, is a *personal privilege*, granted by our Government, how far must the privilege be extended? Certainly it would seem that the privilege cannot be abused, and that having once been waived by the party claiming it, our courts cannot thereafter be compelled to extend the privilege any further to the detriment of the rights of our own citizens.

SECOND POINT.

THERE IS NOT ANY PROOF IN THE CASE REGARDING THE GOVERNMENTAL NATURE OF THE OWNERSHIP OF THE STEAMSHIPS *Murmugao* AND *Cunene*, CONSEQUENTLY A LARGE PART OF THE ARGUMENT IN THE PETITIONER'S BRIEF IS ENTIRELY IRRELEVANT.

Even if the facts were established, the question is, as has been stated by this Court, new and debatable, *Ex Parte Hussein Lufti Bey* (1921), 256 U. S. 616.

As these are cases where the sole question is the question of waiver of immunity, we have omitted to deal with the cases on the question of immunity.

However, in passing, the Court's attention is called to the fact that at no time in these proceedings has there ever been any suggestion presented, in proper form, alleging any government ownership of the vessels.

No such suggestion has been made or presented even up to the present date.

This court, in its decision in *Ex Parte Muir* (1920), 254 U. S. 520, discussed the method by which the question of the alleged immunity of foreign vessels could be presented to our courts for consideration; and it is inconceivable that the decision of this court in that case is unknown to counsel for the owner of the vessels involved here. Yet there has never been the slightest attempt or offer on the part of the owner of the vessels

to comply with the requirements laid down by this court in that decision.

The Portuguese Government has never by proper diplomatic communications or otherwise become, or requested to become, a party to these suits.

As the Circuit Court of Appeals for the Second Circuit pointed out, the answers were verified by the Acting Consul General of Portugal *on information and belief,* and he stated that the sources of his information and the grounds for his belief were statements made to him by agents of the vessels.

Moreover, as the Circuit Court of Appeals also pointed out in its opinion, the answers filed on behalf of the owner of the vessels, did not even allege that the vessels were owned by any foreign sovereign government, but merely alleged that the vessels were owned by a department of a sovereign foreign government. *There was nothing set forth in the answers to show that the ownership of the department was in fact the ownership of the sovereign itself.*

The significance of this general situation is that everything done in these cases, on behalf of the owner of the vessels, leads to the strong presumption that the allegation of Government ownership and immunity, besides being presented too late, is not well founded.

It is difficult to believe that had these vessels been actually owned and operated by the Government of Portugal, the Acting Consul General, in attempting to plead that fact in the answers, would have been obliged

to rely on information given to him by the vessels' agents. It would seem that he should have been able to obtain direct information from the Government which he represented.

It is to be remembered that the answers were not filed until some three weeks or more after the vessels had been arrested.

Surely there was ample opportunity for the Consul to have communicated with his Government during that time, and no legitimate excuse can be put forward for the Consul's lack of information if, in fact, the vessels had been owned and operated by his Government.

It is further significant that the Government of Portugal has never made any direct suggestion to the court in these proceedings with respect to the alleged Government ownership, in spite of the requirements so clearly set forth by this Court in *Ex Parte Muir, supra.*

It is also significant that the Government of Portugal has never made any representation to the court that the filing of the general appearance, claims and bonds at the outset of the litigation was the act of an unauthorized agent. *The filing of those documents has never been repudiated by the Portuguese Government.*

Counsel for the appellant now unscrupulously seeks to inject into the cases, by means of the so-called "Exhibit I" attached to appellant's brief, some testimony to support his statement that the vessels were in fact owned by the Portuguese Government.

The libelants-appellees have filed a motion to strike the said "Exhibit I" from the records of the court in these cases.

Even if the "Exhibit I" could be accepted by the Court, it is significant that in the matters contained in that document, there is not any properly authenticated proof of government ownership.

Therefore, in addition to the fact that immunity, if any ever existed, was waived at the outset of these suits, there is the fact that at *no* stage of these proceedings has there ever been any proper foundation for any claim of immunity.

THIRD POINT.

THE LITIGATION IN THESE SUITS HAS BEEN CONTINUED BY THE OWNER OF THE VESSELS ADMITTEDLY FOR PURPOSES OF DELAY.

As evidence of this fact, there is the statement made by Frank M. Patterson, Esq., proctor for the owner of the vessels to counsel for Maxwell Rose, at the outset of the litigation, to the effect that if the proceedings were pressed to decrees, he, the said Patterson, on behalf of his client, would be obliged to seize every opportunity and means of prolonging and delaying the litigation. *Motion to Dismiss or Affirm*, fols. 24, 25.

There is the further evidence of this fact in the statement made by the present counsel for appellant to Judge Augustus N. Hand, in the course of these proceedings, in which Mr. Kohler said that although the claims put forward by Maxwell Rose would, in his opinion, even-

tually be paid, the payment was being delayed because of the fact that the owner of the vessels could not, under the existing depreciation in the rate of exchange, make payment without great sacrifice to itself. *Motion to Dismiss or Affirm*, fol. 35.

It is submitted that these statements furnish the key to the belated attempt of the owner of the vessels to put forward the alleged immunity of the vessels.

The probabilities are that when the general appearance, claims and bonds were filed, it did not occur to the owner of the vessels to set forth any reservations regarding alleged immunity, *because of knowledge that the grounds for such immunity did not exist.*

Subsequently, having found that no defense could be set forth to the claims on the merits, the owner of the vessels unscrupulously attempted, in its answers, to inject the suggestion of immunity into the cases, in the hope of prolonging the litigation, and thus gaining its end with respect to delaying the day of reckoning.

Certainly that explanation of the situation makes clear the continued failure of the Portuguese Government to make any direct or proper representations to the court of the alleged government ownership.

Under such circumstances, it is difficult to believe that this Court will consider any extension of the *privilege* of immunity beyond the strict requirements of law and international comity.

FOURTH POINT.

THE MOTIONS TO DISMISS OR AFFIRM.

The Court's attention is again directed to the fact that in all five of the cases, motions to Dismiss or Affirm were presented to this court on May 1, 1922.

Thereafter the court postponed the consideration of the said motions until the final argument of the appeals.

All of the matters which have been discussed heretofore in this brief amplify the grounds set forth in the moving papers as the basis for the motions to Dismiss or Affirm.

LAST POINT.

THE WRIT OF CERTIORARI SHOULD BE DISMISSED, OR THE ORDERS OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE AFFIRMED.

Respectfuly submitted,

JOHN M. WOOLSEY,
ROBERT S. ERSKINE,
Counsel for Maxwell Rose.

OCT 3
WM. R. ST

Supreme Court of the United States

October Term, 1922.

Nos. 279, 280, 281, 282 and 283.

TIETJEN & LANG DRY DOCK COMPANY,
Libellant-Appellee,
against
THE STEAMSHIP "SAO VICENTE," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,
against
The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

MAXWELL ROSE, doing business under the trade names of BATTERY OPERATING COMPANY and WHITEHALL STEVEDORING COMPANY,
Libellant-Appellee,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,
against
The Steamship "MORMUGAO," her engines, etc., Transportes Maritimos do Estado,
Claimant-Appellant.

THOMAS De SIMONE,
Libellant-Appellee,
against
TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant.

REPLY BRIEF FOR THE CLAIMANT AND RESPONDENT-APPELLANT.

F. DUDLEY KOHLER,
Proctor for Claimant and Respondent-Appellant,
25 Broadway,
New York City.

PRESS OF FREMONT PAYNE, INC., 80 Washington St., New York City.

SUBJECT INDEX.

PAGE

Brief re Statement of Facts 2

Argument:

Point I—Submission of Exhibit 1 4

Reply to Brief of Appellee Tietjen and Lang Dry Dock Co. 6

Point II—Reply to Appellee's Statement of Facts 6

Point III—Reply to Appellee's Point I that Jurisdictional Question is not Reviewable by this Court 7

Point IV—Reply to Appellee's Point II that the suit is not against the Government of Portugal 9

Point V—Reply to Appellee's Point III Concerning Jurisdiction over the S. S. "Sao Vicente" 11

Reply to Brief of Appellee Rose 15

Point VI—Reply to Appellee's Statement of Facts 15

Point VII—Reply to Appellee's First Point that the Court has Jurisdiction of the Subject of these Suits and of the Vessel 16

PAGE

Point VIII—Reply to Appellee's Second Point Concerning Lack of Proof of Government Ownership of the Vessels 19

Point IX—Reply to Appellee's Third Point Asserting that the Litigation herein was for Delay 20

Reply to Brief of Appellee DeSimone 21

Point X—As to Appellee's Statement of Facts 21

Point XI—Reply to Appellee's Point I, as to Jurisdiction and Waiver 22

Point XII—Reply to Appellee's Point II, as to Waiver by Engaging in Commerce 24

Point XIII—The Cases should be Remanded with Direction to Dismiss . 30

The "Porto Alexandre" Case 27, 28

TABLE OF CASES.

	PAGE
Attualita, The, 238 Fed., 909, 152 C. C. A., 43	27
Carlo Poma, 255 U. S., 219	9, 13
Carlo Poma, 259 Fed., 369	26
Carr vs. United States, 98 U. S., 432	8, 15, 18
Clark vs. Barnard, 108 U. S., 436	13
Cooper vs. Reynolds, 10 Wall., 308	16, 19, 31
Davis, The, 10 Wall., 15, 19 L. Ed., 875	9, 27
De Simone vs. Transportes, 200 N. Y. App. Div., 82	8, 13, 19, 23
Farrar & Brown vs. U. S., 3 Pet., 458	18
Gunter vs. Atlantic Coast Line, 200 U. S., 273	13
Hassard vs. Mexico, 45 App. Div., 623; 29 Misc., 511	8
Jassy, The (1906), P. 270	27
Jones vs. Andrews, 10 Wall., 327	12
Kingdom of Roumania vs. Guaranty Trust Co., 250 Fed., 341	8
Lake Monroe, 250 U. S., 246	13
Long vs. The Tampico (D. C.), 16 Fed., 491	27
Luigi, The, 230 Fed., 493	10, 11, 12
Maipo, The, 252 Fed., 627, 259 Fed., 367	25, 27, 30
Muir, Ex Parte, 254 U. S., 522	13
Pampa, The (D. C.), 245 Fed., 137	27
Parlement Belge, Law Reports 5, P. D., 197	27
Pesaro, The, 255 U. S., 216	13, 30
Pesaro, The, 277 Fed., 473	30
Porto Alexandre (1920), P. 30	27, 28
Porto Rico vs. Ramos, 232 U. S., 627	13, 23
Porto Rico vs. Rosaly, 227 U. S., 270	23
Rhode Island vs. Massachusetts, 12 Peters, 657	24
Richardson vs. Fajardo Sugar Co., 241 U. S., 44	13
Siren, The, 7 Wall., 152	9

PAGE

Stanley vs. Schwalby, 147 U. S., 508 .... 8, 14, 19
Ucayali, The, 159 Fed., 800 12
United States vs. Lee, 106 U. S., 196 ..... 8, 19
United States vs. New York & O. S. S. Co., Ltd., 216 Fed., 61 ..... 14, 19, 31
United States vs. Thompson, 66 U. S. (L. Ed.) 185 14
Workman vs. New York City, 179 U. S., 552.. 18

Supreme Court of the United States

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STEAMSHIP "SAO VICENTE," her engines, etc., TRANSPORTES MARITIMOS DO ESTADO,
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Libellant-Appellee, 280

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Respondent-Appellant.

THOMAS DE SIMONE,
Libellant-Appellee,

against

STEAMSHIP "MORMUGAO," her engines, etc.,
Claimant-Appellant. 282

THOMAS DE SIMONE,
Libellant-Appellee,

against

TRANSPORTES MARITIMOS DO ESTADO,
Respondent-Appellant. 283

REPLY BRIEF FOR APPELLANT.

Facts.

In the Tietjen & Lang Dry Dock Company case the libel was filed on April 14th, 1921, for materials, supplies and services alleged to have been furnished to one of the appellant's ships (Record, pages 1, 2). This ship was owned by the Republic of Portugal and operated by the Transportes Maritimos do Estado, a department of that sovereign government (Record, page 3). The vessel was arrested by the United States Marshal, and thereafter the Portuguese Vice-Counsul General filed a claim of ownership on behalf of the Portuguese Government and a bond for the release of the ship (Record, page 14), and thereafter an answer was filed to the libel setting up the fact that the ship was the property of the Portuguese government, engaged in the public service of that government and objecting to the jurisdiction of the United States District Court (Record, page 3). The libellant filed exceptions to this answer alleging that it did not state facts sufficient to constitute a defense and that by appearing and answering the libel the Portuguese government had waived its immunity and objections to the jurisdiction of the Court (Record, page 5). These objections were sustained (Record, page 5) and a final decree was entered in favor of the libellant (Record, page 11).

The facts were practically the same in the other cases. Maxwell Rose instituted two actions, one in rem against the "Mormugao" (Record, pages 44 & 45) and the other in personam with a clause of foreign attachment against the Transportes Maritimos do Estado for services and wharfage to the "Cunene." Both vessels were

owned and operated by the Portuguese government (Record, pages 47, 108). The "Mormugao" was arrested in the in rem action and in both actions stipulations for value were filed. Answers were filed in both actions as in the Tietjen & Lang case (Record, pages 107, 162). The same exceptions to these answers were filed and sustained (Record, pages 48, 109) and final decrees were entered in favor of these libellants (Record, pages 86, 142).

Thomas DeSimone also instituted two actions as did Maxwell Rose, one in rem and the other in personam with a clause of foreign attachment (Record, pages 179-212). Libels were filed and process being waived stipulations for value were filed (Record, pages 179-212), and answers were filed in both cases setting up the same defenses as in the preceding cases (Record, pages 162, 195). Exceptions were also filed to these answers and upon the argument of these exceptions, Manton, J., overruled them, holding that the Portuguese government did not waive the jurisdictional question by its appearances and answers. These two cases were thereafter tried together (Record, pages 164, 198) and at the close of the trial, Manton, J. reversed himself and sustained the exceptions, holding that having appeared and answered, the appellant could not avail itself of its defense of sovereignty (Record, pages 210, 211). Final decrees were thereafter entered in favor of the libellants (Record, pages 176, 211).

From all of these decrees appeals were taken to the United States Circuit Court of Appeals, which affirmed all of the decrees of the District Court. (Record, pages 12, 56, 89, 96, 145, 151, 176, 185, 214, 220.)

From the foregoing it will be observed that there are two questions upon these appeals.

1. The sovereignty of the appellant and its immunity from the jurisidiction of the United States Courts.
2. Whether the appellant waived its immunity and right to object to the jurisdiction of the Courts of the United States.

POINT I.

Exhibit 1 was submitted with appellant's brief for the information of the Court.

The sovereignty and immunity of the appellant are matters of which this Court should take judicial notice. It can take judicial notice of the fact that the Transportes Maritimos do Estado is a sovereign part of the Portuguese national government to prevent an improper exercise of jurisdiction by our courts just as it would be expected that any foreign court would take judicial notice of the fact that the United States Navy Department was a part of our government. To this end it does not require evidence. It is entitled to access to any and all records or information from any source. This Exhibit 1, although it is a return upon a commission in another case now pending in the United States District Court, contains statements of the Director General of the Transportes Maritimos do Estado in Portugal, who certainly is competent to state just what the status of this department is with relation to his government, and it is respectfully submitted that this Court is entitled, if it wishes it, to know what

this status is on this authority in order to prevent a miscarriage of justice or an improper assumption of jurisdiction. It was with this in view that Exhibit 1 was submitted and attached to the brief herein and not with any intent to inject improperly any evidence into this case. If in the opinion of the Court this Exhibit is improperly submitted on this appeal, the appellant will be pleased to withdraw it. The appellant's case does not in any way rest or depend upon this exhibit. As is shown in the Record (pages 34, 47, 108, 163, 196) there is abundant to show that the Transportes Maritimos do Estado is in fact a sovereign department of Portugal (pages 5, 48, 109, 187-8, 222-3, 205-6, 209-10) and in fact the libellants have one and all admitted this fact by their exceptions to the appellant's defenses in its answers, and relying upon the decisions of the lower courts on these exceptions in all of the cases, and in the third case also on the refusal of the court to accept evidence on this question on the grounds asserted by the libellant in his exceptions to the answer (pages 209-10), and also in the testimony of libellant that he knew of the sovereign ownership of these vessels (Record, pages 205-6).

The commission was complete as it was received. The fact that certain cross interrogatories and answers were omitted (Exhibit 1, pages 22, 29) is because these interrogatories were stricken out of the commission by Augustus N. Hand, D. J., when issuing the commission. They are immaterial as they had no bearing on this question of sovereignty. The translator was agreed upon by stipulation of counsel in that case after advice that the services of the court interpreter were not available (Exhibit 1, page 33).

REPLY TO BRIEF OF APPELLEE TIETJEN AND LANG DRYDOCK CO.

POINT II.

The arguments in the statement of facts in the brief of the Tietjen and Lang Drydock Co. are all aside from the question at issue.

The ships were owned and operated by the sovereign government of Portugal and that government and its property were not subject to the jurisdiction of our Court. It makes no difference who ordered the repairs (Appellee's Brief, page 4) or when or how the claim to immunity was raised (Appellee's Brief, pages 10, 11). The want of jurisdiction may be raised at any stage of the action. It is sufficient if the actions are against a sovereign or its property. Then the Court should take judicial notice of this fact and direct the dismissal of the libels.

POINT III.

The jurisdictional question in these cases is reviewable by this Court.

The argument in appellee Tietjen & Lang Dry Dock Company's brief (page 12) that there is jurisdiction of the subject matter, is beside the point. The appellant admits that a sovereign may subject itself to jurisdiction but it must be and is conceded that there can be no jurisdiction of sovereign property, which is the subject matter of these actions

without the sovereign's consent, and there was no such consent in these cases. These cases here cited by appellee, for this reason as well as for the reasons pointed out by Mr. Justice Page in DeSimone vs. Transportes Maritimos do Estado (200 N. Y. App. Div., 82; Appellant's Brief, pages 35, 36) do not support the appellee's contention. To give jurisdiction the sovereign must consent, not by any act of its representatives here, but by a sovereign act, as, in the case of a Republic, by a legislative act.

It was in fact held in Kingdom of Roumania vs. Guaranty Trust Co. (250 Fed., 341), that a voluntary appearance in our Courts by a foreign sovereign and its prosecuting an action therein, the invoking of their jurisdiction on its behalf, does not imply a consent to the prosecution in the same action of a counterclaim against it. Certainly a mere appearance and answer in a suit in which it is made a defendant in the first instance, cannot amount to the necessary consent to be sued, when in its answer it expressly objects to the jurisdiction of the Court.

This rule applies as well to suits against the property of a sovereign as to suits against the sovereign. So far as jurisdiction is concerned there is no difference between these actions.

> Stanley vs. Schwalby, 147 U. S., 508;
> United States vs. Lee, 106 U. S., 196;
> Hassard vs. Mexico, 45 App. Div., 623; 29 Misc., 511.

In Carr vs. United States, 98 U. S., 432, where it was claimed that the United States had waived its objection to jurisdiction, the Court said:

> "We consider it to be a fundamental principle that the government cannot be sued except by its own consent * * *." It is conceded in The Siren (7 Wall., 152) and in The Davis 10 (id. 15) that without an act of Congress no direct proceeding can be instituted against the government or its property.
>
> In some cases * * * it might not be apparent until after suit was brought that the possession attempted to be assailed was that of the government; but when this is apparent by the pleadings, or the proofs, the jurisdiction of the Court ought to cease."

The contention that the decrees herein are not reviewable because the appeal was not taken directly to this Court instead of by writ of certiorari from the Circuit Court of Appeals, is sufficiently and conclusively answered in appellant's brief (Point X, page 22). In the Carlo Poma, 255 U. S., 219, case cited by appellee it will also be noticed that this Court by its decision in effect sustained a decree denying jurisdiction. If on the other hand the decree of the lower Court had affirmed an improper exercise of jurisdiction then this Court under the decisions cited in appellant's brief (Point X, pages 25, 26) would doubtless in order to have prevented such improper assumption or exercise of jurisdiction, have taken judicial notice of the want of jurisdiction and directed the dismissal of the case. The Court can always review a decree which upholds jurisdiction of the Court where no jurisdiction in fact exists.

POINT IV.

The action was against the Portuguese Government.

The ships were owned by the Portuguese Government and not by a separate entity. The Transportes Maritimos do Estado was not as stated by the respondent (Brief, page 16) a separate entity. It was not like the Emergency Fleet Corporation, but rather like the State, War or Navy Department, or any other department of the Federal Government, none of which can be sued.

The statement on page 16 of this appellee's brief, that the allegations in the libels, that the Transportes Maritimos do Estado was a separate and a foreign corporation, are not denied, is not true. These allegations are both denied in the answers in the cases there mentioned (Record, pages 107, 196).

NO PROOF WAS SUBMITTED ON THE TRIAL IN THE DE SIMONE CASES UPON THIS POINT IN THE DISTRICT COURT, BECAUSE THE JUDGE REFUSED TO RECEIVE IT (pages 209, 210).

It is difficult to understand how this appellee could cite the Luigi case, 230 Fed., 493, except from a misunderstanding of the case or an attempt to distort its finding or befog the issue (Respondent Tietjen & Lang Dry Dock Company's Brief, page 17). This *appellant filed a bond* of the American Surety Company giving its own property as security to that company for the bond to release its ves-

sel, and thus in effect substituted other property of its own in place of the vessel to the peril of the action, whereas in the Luigi case as we have pointed out (Brief, page 21), the vessel was *privately* owned, held under requisition by the sovereign and the *private* owner filed the bond and the Court allowed the attachment to stand only on the ground that as the private owner had intervened the sovereign rights could not be affected. This case is therefore not at all in point as cited by the appellee. In this case to permit these decrees to stand on such a ground as here claimed by this appellee, would merely amount to a sanctioning of a roundabout method of forcing a sovereign to submit itself to the jurisdiction of our courts by attaching its property, which it has been distinctly held cannot be done (Appellant's Brief, page 15, and cases cited).

POINT V.

The District Court never had jurisdiction of this appellant or any of its ships.

This appellee's argument in its Point III can readily be answered.

1. This appellant did not submit itself or its property to the adjudication of our courts. It objected to that adjudication (Record, pages 162, 195). The ships in these cases *were public property* in the *actual* possession of the sovereign, and the sovereign in these cases came in and asserted

its ownership and objection to jurisdiction, and therefore the Court should not have assumed jurisdiction over it or its property without its consent and in spite of its ownership and sovereignty.

2. Abundant authority is given in appellant's brief (Point IV) and supra (Point IV) to show how a sovereign's consent to jurisdiction must be given and that it cannot be implied as in the case of non-resident corporations as alleged by this appellee (Brief, page 18).

3. This appellant did not come into court as a private citizen or claim the ships in the name of a private entity as alleged by this respondent in his brief (page 19). It came in as the Transportes Maritimos do Estado, a department of the sovereign government of Portugal, and filed a bond by its Consul-General in his official capacity to release its property as stated above, and then in its answer so verified by its Consul General, as it had a perfect right to do, set up its immunity and objections to jurisdiction (Appellant's Brief, page 12, and cases cited). At no time did it consent to the jurisdiction of the Court and there could be no implied waiver of its objection to that jurisdiction as we have conclusively shown (Appellant's Brief, Point IV, page 13). If the objection was not raised before the answer, that does not affect the case as this objection can be first raised at any time, even on appeal to this Court.

4. The Luigi case cited is not, as we have shown in point. In the "Ucayali" case, 159 Fed., 800, and Jones vs. Andrews, 10 Wall., 327, there is no ques-

tion of sovereign immunity involved and these cases are therefore not at all in point here. Clark vs. Barnard, 108 U. S., 436, Gunter vs. Atlantic Coast Line, 200 U. S., 273, Porto Rico vs. Ramos, 232 U. S., 637, and Richardson vs. Fajardo Sugar Co., 241 U. S., 44, cited by this appellee, have no real bearing upon the issues involved in the cases on this appeal, and they are ably distinguished by Mr. Justice Page in his opinion in DeSimone vs. Transportes Maritimos do Estados (200 N. Y. App. Div., 82, Appendix B, Appellant's Brief, page 33).

5. The "Lake Monroe," 250 U. S., 246, cannot possibly be regarded as having any bearing on this appeal. It does not support the proposition to which it is cited, and moreover the decision turns upon a specific Act of Congress under which vessels *purchased, chartered or leased* from the United States should under certain conditions be subject to all the laws, regulations and liabilities governing merchant vessels. Certainly this Act has no bearing upon the appellant's ships and this case has no bearing upon any of the issues on this appeal. The "Pesaro," 255 U. S., 216, The Carlo Poma, 255 U. S., 219, and Ex parte Muir, 254 U. S., 522, are not in support of the proposition to which they are cited. Two of these cases are discussed by Mr. Justice Page in DeSimone vs. Transportes Maritimos do Estado (supra, Appellant's Brief, pages 42, 43). In any event there has been advanced no answer to the indisputable fact that this question of jurisdiction and the status of the appellant is one which this Court may take judicial notice and so decide as to prevent the exercise of jurisdiction where no jurisdiction exists.

6. The case of U. S. vs. Thompson, 66 U. S. (Lawyer's Ed.), 185, is rather in support of the appellant's contention that the sovereign cannot be sued without its consent and that its immunity extends to its property. It does not hold that the immunity exists only so long as the vessel is used for national objects, but in these cases the vessel was owned by the sovereign and used for sovereign purposes. It makes no difference what the sovereign purpose was. Our courts cannot say to a sovereign that it may use its property for one purpose and not for another; they cannot determine for what purpose the foreign sovereign may use its ships. As held in many cases the immunity of the sovereign vessel is not affected by its use (Appellant's Brief, page 10).

It is admitted that the appearances in these cases were general but the appearance was accompanied by an answer which set up the appellant's immunity and objection to jurisdiction and therefore cannot be regarded as a consent to submit to that jurisdiction to which it objected (Appellant's Brief, pages 10, 16). If it is true jurisdiction once acquired will be maintained, in our cases jurisdiction was never acquired, as the appelant was sovereign and never consented, but always objected to that jurisdiction. The case of United States vs. New York and Oriental S. S. Co., Limited, 216 Fed., 61, 63, holds that the sovereign, in this case the United States, cannot be sued without its consent and that its consent to be sued must be evidenced by an Act of Congress and cites Stanley vs. Schwalby, 162 U. S., 255, and further it holds that government officers cannot waive the government's privilege in this respect and that their consent that

such a suit should be brought cannot bind the Government of the United States (Carr vs. United States, 98 U. S., 432). This is this appellant's contention. In our cases certainly it is not claimed that there was such consent to these suits as an Act of Congress.

The entire brief of this appellee seems to be illogical and aside from the issues involved and to contain only arguments having no real bearing upon the facts and the citation of cases either not in point, or many of which are distinctly in support of appellant's contentions.

REPLY TO BRIEF OF APPELLEE ROSE.

POINT VI.

The argument in the Statement of Facts of the appellee Rose is immaterial and in some respects false.

1. It is here again stated that the Transportes Maritimos do Estado is a foreign corporation (page 4). This is untrue. It was denied in appellant's answers. It was not proven by the libellant and in fact it was admitted by his exceptions to the defense in the answers that it was a part of a sovereign government.

2. The statement that the jurisdiction of the courts and the writs were not challenged is untrue. They were challenged in the answer and this is one of the main questions in these cases.

3. How,—in the face of the decisions of this Court cited in appellant's brief showing that the filing of bonds, appearances and answers as in these cases can confer on the Court no jurisdiction over a sovereign where none could exist without its consent signified by a distinct sovereign act,—it can be claimed by this appellee, who, it is presumed knows the law, that jurisdiction can be acquired by any of the acts or procedure mentioned in the appellant's brief, it is difficult to understand. In these cases the bonds were signed in the name of the appellant by a consular officer with the surety company as surety, so that it is clear that the property of the sovereign is substituted for its ships, and that, if this decree is affirmed it will be virtually permitting the Court to force the sovereign to submit to it by attaching its property, to acquire jurisdiction by an act which it had no jurisdiction to commit.

The remainder of the statements and arguments of the appellee (pages 6-10) are without weight, and it is not necessary to refer to them except to point out that there are two points raised in this appeal and not merely one; viz., the question of jurisdiction and waiver which are distinct.

POINT VII.

The District Court has no jurisdiction of the subject or of the person in these cases.

This fact we have shown above and clearly in our brief. The case of Cooper vs. Reynolds, 10 Wall., 308, does not support this appellee's claim (Appellee's Brief, page 11). We take no exception to the

quotation given. Here there was no question of sovereignty. In our cases the Court had no power over this appellant nor over the res or property and had no right to render the judgment because of the sovereignty of the appellant. The sovereign power which organized our Court could not confer any such authority as it had none itself over the appellant or its property. The appearances in these cases with a distinct protest and objection to jurisdiction which the decisions cited by appellant in its brief show, can properly be raised in the first instance in the answer. The power of the Court to render a decree or judgment in a particular case depends upon the nature and extent of the authority vested on it by law in regard to the subject matter of the cause. In these cases no authority was vested in the Court by law as the law itself had no such power over this sovereign appellant. In these cases are therefore none of the elements necessary to found the decree and it is wholly immaterial whether the claims were or were not admiralty claims.

It seems absurd to say (page 12) that the Court had jurisdiction over the person of this sovereign appellant and over its property, the disposition of which is the subject of these actions on the ground that stevedoring contracts are subjects of its maritime jurisdiction. Equally untenable is the argument that the jurisdiction of the Court was completed over the person of this sovereign appellant and its property by the filing of the claims and appearances and the answers, objecting to that jurisdiction (page 13) in the face of the decisions of this Court directly opposed to any such claims (Appellant's Brief, pages 10, 12, 13, 14).

A general appearance will confer jurisdiction on the Court only in cases where the Court would acquire jurisdiction by the proper service of its process. In our cases such service would not confer jurisdiction over this appellant.

There is no proof in these cases that the Consular officer had any authority to waive the appellant's immunity by reason of its sovereignty (page 14) and certainly where such immunity cannot be waived by any officer but only by a sovereign act of the sovereign itself, our court cannot acquire jurisdiction by a mere presumption (page 13) of its own that any agent had such power, and this being so it is not material whether the consular officer intended to appear, or file a bond or answer in these cases. The recourse to this kind of argument only serves to emphasize the weakness of the appellee's contention.

It will be readily seen by the quotation given (pages 15, 16) particularly at the close of the quotation (page 16) that the case of Workman vs. New York City, 179 U. S., 552, is strongly in support of this appellant, as it is a *foreign sovereign over whose person and property jurisdiction cannot be exerted.*

The case of Farrar & Brown vs. U. S., 3 Pet., 458 (page 16), does not help the appellee. In this case the question is the consent of a sovereign to the jurisdiction of its own court; not as in our case, an exercise of jurisdiction by our court over a foreign sovereign without its consent. In that case it is assumed that the appearance was without objection for the term. In our case the appearance was immediately followed by an answer specifically objecting to the jurisdiction of the Court. In any event this case was directly over-

ruled by this Court in this particular in Carr vs. United States, 98 U. S., 432, United States vs. Lee, 106 U. S., 196, and Stanley vs. Schwalby, 147 U. S., 508, where the Attorney General actually answered and the Court held that this act of the Attorney General could not constitute a voluntary submission of the United States to the jurisdiction of the Court and that in appearing and answering as far as binding the sovereign to consent to the jurisdiction of the Court it was in excess of his authority and to that extent unauthorized and a nullity. The other cases cited by this appellee on this point (pages 18, 19, 20) have already been discussed above and ably distinguished in DeSimone vs. Transportes Maritimos do Estado, 200 N. Y. App. Div., 82 (Appellant's Brief, Appendix B, page 35).

The appellant's statement, referred to on page 21 of this appellee's brief, is in effect that a voluntary appearance and/or an answer might waive objection to jurisdiction only in the cases mentioned and in this there is no fallacy. The statement that the "subject matter of the action is sovereign property" is in these cases correct. "Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong" (United States vs. New York & O. S. S. Co., 216 Fed., 61, 66, citing Cooper vs. Reynolds, 10 Wall., 308). Cases of the general class to which the cases at bar belong are cases involving the rights of a sovereign and the sovereign's control of its property, the immunity of a sovereign and of sovereign property.

The remaining arguments in this appellant's First Point (pages 21, 22), rest upon the assumption of waiver of objection to the jurisdiction of the Court by the sovereign, but since, as we have

shown (Appellant's Brief, Points III and IV, pages 10, 16), that there was no such waiver these arguments fall.

POINT VIII.

The governmental ownership of the steamships of this appellant is established.

This ownership is admitted by the libellant's exceptions to the answers in these cases which operate as demurrers and thus for the purposes of these suits, admit the truth of the allegations to this effect in the answers (Record, pages 5, 48, 109). (The exceptions and orders overruling them were omitted from the printed record by error.)

If there is no other evidence in the record as to this ownership it is due to the fact that owing to the decree sustaining of these exceptions there were no trials in the first three cases (Record, pages 8, 52, 113), and in the DeSimone cases, the Court refused to receive evidence on this point (Record, pages 209, 210, 211, see Appellant's Brief, Point I, page 6).

The rest of the argument in this point has already been discussed above in answer to the brief of appellee Tietjen & Lang Dry Dock Co. It is moreover irrelevant for the sovereign in these cases properly relied upon its protest against and objection to the jurisdiction of the Court raised in its answers (Appellant's Brief, page 12) and its emphatic denial therein of consent to that jurisdiction. Under these circumstances it was unnecessary for it specifically to repudiate the filing of any documents or to take any other steps. The

fact is that the Court had no jurisdiction and of this, this Court can take judicial notice. It is fatal to these decrees.

The allegation in the appellee's brief (page 24) that "there was nothing set forth in the answers to show that the ownership of the department was in fact the ownership of the sovereign itself" is puerile. The answer states that the ship is owned and operated by the Transportes Maritimos do Estado and that the Transportes Maritimos do Estado is a department of the sovereign Government of Portugal (Record, pages 46, 107). It must follow that if the ship is owned by a department of the Sovereign Government, a part of that government, it is owned by that government. This is plain logic.

POINT IX.

The litigation has not been for delay.

The answer to this assertion in appellee's brief (page 26) is that it is not true (Affidavit in Opposition to Motion to Dismiss or Affirm, Art. XIV, page 10, Art. XVI, page 12).

Reply to Brief of Appellee De Simone.

POINT X.

As to the Facts.

The statement that there is no affirmative allegation in the answer in the action in personam that the appellant is not a foreign corporation is misleading. There is a direct allegation in the libel

that it is a foreign corporation and a positive denial of this averment in the answer (pages 162, 196). The answer also affirmatively states that it is a department of the Government of Portugal. It is not necessary in view of the denial and allegations to state affirmatively that it is not a foreign corporation.

The answer in the Tietjen and Lang Drydock Co. case states that the vessel was engaged in the *public* service of Portugal, and all the answers allege affirmatively that the vessels were owned and operated by the sovereign government of Portugal. In fact the vessels were all engaged in the *public* service of Portugal carrying supplies for the rehabilitation of the country after the war, supplies purchased by the government and carried in her own ships for this purpose. (Aff't of Geo. S. Duarte, in opposition to motion to affirm or deny.) The Consul General further states in his petition for the writs of certiorari herein that all of these vessels were the *public* property of the Government of Portugal (Petition, page 6).

POINT XI.

This appellee adds nothing of weight in support of the claim of waiver of jurisdiction in these cases.

There is nothing in the first point of this appellee's brief (pages 6 to 14) that has not been answered above and in appellant's brief. The cases cited can be readily distinguished as was shown by Justice Page in the De Simone case in the Appellate Division of the New York Supreme Court, supra, and in this appellant's brief.

As far as they are relevant they support the appellant's contentions on this appeal rather than those of this appellee. (Appellant's Brief, pages 21, 36, 37.) In Porto Rico vs. Ramos, 232 U. S., 627, the Attorney General of Porto Rico *asked leave to intervene and be made a party defendant.* The Court *granted the motion.* The People of Porto Rico then demurred on the ground of sovereign immunity and the Court held that if the suit had been originally against the People of Porto Rico it could have relied upon this immunity under Porto Rico vs. Rosaly, 227 U. S., 270.

The assertion on page 10 of this appellant's brief that if a foreign sovereign should appear and answer, presumably he wishes to be understood, as did this appellant, he may not withdraw without the consent of the Court, appears to be wilfully misleading. It is not the law. The cases cited by him to this proposition do not support such a statement. None of them touch upon this question of the effect of an appearance by a foreign sovereign. It is well settled law that a foreign sovereign cannot be sued in our Courts without its consent and that an objection to the exercise of jurisdiction may be raised at any stage of an action by the parties or by the Court itself (Appellant's Brief, pages 6, 10, and cases there cited). In Rhode Island vs. Massachusetts, 12 Peters, 657, cited by the appellee, the Court said at page 720 (italics ours):

> "When the objection goes to the power of the Court over the parties or the subject matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in

> Court or equity, the ground of the objection is not taken by plea in abatement as an exception of the given case from the otherwise general jurisdiction of the Court; *appearance does not cure the defect of judicial power* and it may be *relied on by plea, answer, demurrer or at the trial or hearing* unless it goes to the manner of bringing the defendant into Court."

Therefore it was not necessary for this appellant to attempt to withdraw its appearance or answer. It could properly rely upon its answers and the defense of immunity and objection to jurisdiction which they contained. In fact it is a universally recognized principle that a foreign sovereign is entirely and completely immune from the process and jurisdiction of our Courts (Cases cited in Appellant's Brief, page 8). This includes judgments as well as other processes. It follows therefore that this objection can be first raised at any time including upon the appeal before this Court.

POINT XII.

This appellant did not waive immunity by engaging in commerce and trade.

In support of this proposition the "Maipo," 252 Fed., 627; 259 Fed., 367, is quite emphatic.

(a) In this case a naval transport of Chile carried a commercial cargo on a voyage here to obtain a cargo for the Chilean Government. Judge Mayer held that the vessel was immune although engaged

in a commercial enterprise. This case came before the same court a second time, and Judge Hough then said, to the same effect (259 Fed., 367):

> "Why was a war vessel exempt from seizure? Not because it was a war vessel but because it was a part of the exercise or manifestation of sovereign power. Why is any other vessel exempt? Why may any other piece of property be exempt? For the same reason, just as the sovereign himself is exempt. Now, it may be the opinion of counsel, as it assuredly is my opinion, that when a sovereign republic * * * goes into business and engages in the carrying trade, it ought to be subject to the liabilities of carriers just as much as any private person, but I think it must be plain that if I, in my official capacity, were to assert that view and enforce it, I would be assuming (in this case) as one of the humbler officers of the Government of the United States, to prescribe to the Republic of Chile what that republic should consider to be a governmental function. If the Republic of Chile considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chile; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged, which has hitherto been accorded to governmental property, then we must say so through diplomatic channels and not through the judiciary. Otherwise the judiciary are really contributing to what might become, under conceivable circumstances, a *casus belli*."

In other words, rights or claims as in the case at bar *are not the subject of jurisdiction of our courts but should be adjusted through diplomatic channels* between *the governments concerned,* that is, as Judge Hough said, the questions are *"not justiciable, but diplomatic."*

(b) In the *Carlo Poma,* 259 Fed., 369, also a recent case in this Circuit, the vessel was carrying a cargo of lemons and other merchandise for private persons under regular bills of lading and the Court, Ward, Circuit Judge, affirming the order staying the execution of process against the ship, delivering the opinion, said:

> "We are concerned in this case only with the property of a foreign sovereign. The appellant contends that a vessel of a foreign sovereign not being a war vessel or at the time performing public duties but engaged in carrying cargo commercially is not entitled to immunity from suit. The English Courts go the whole way in refusing process against property of a foreign sovereign under any circumstances. This because of the international comity due from one sovereign to another. *The Parlement Belge,* Law Reports 5, P. D. 197; *The Jassy* (1906), P. 270. The law of the United States is the same, except that the immunity of property of a sovereign, whether the United States or a foreign sovereign, depends, not merely upon the ownership, but also upon the actual possession by the sovereign of the property at the time the process is served. *The Davis,* 10 Wall., 15, 19 L. Ed., 875;

> *Long* vs. *The Tampico* (D. C.), 16 Fed., 491; *The Attualita,* 238 Fed., 909, 152 C. C. A., 43. * * * It follows from these principles that the order appealed from was right. Similar conclusions have been reached by district judges in this circuit. Judge Veeder in the case of the *Pampa* (D. C.), 245 Fed., 137; Judge Mayer in the case of the *Maipo* (D. C.), 252 Fed., 627; and Judge Hough as to the same steamer, February 21, 1919."

In the Porto Alexandre, (1920) P., 30, Mr. Justice Hill set aside the writ in rem on his conclusion that the law as laid down in the *Parlement Belge* was that a sovereign state could not be sued either by being served in personam or indirectly by proceedings against its property and that therefore it mattered not how the property was being employed. It was here held that a vessel owned or requisitioned by a sovereign independent state and carrying freight for the state was not deprived of the privilege decreed by international comity of immunity from the process of arrest by reason of being employed in ordinary trading voyages, carrying cargoes for individuals. On appeal from this decision of Justice Hill, Lord Justice Scrutton held that there was no such distinction, and said:

> "These are matters to be dealt with by negotiations between governments and not by governments exercising their power to interfere with the property of other states contrary to the principle of international courtesy which govern the relation between independent and sovereign states."

This ship in this case, the "Porto Alexandre," was precisely the same in status as the ships involved in the cases at bar. She was owned by the Government of Portugal, was owned and operated by the Transportes Maritimos do Estado, a department of said government, and was being operated as public property of the said government precisely as were the ships in these cases, and the case was dismissed on the ground of the immunity of the Government of Portugal and of its property. Here we have a direct adjudication on the facts in these appeals. All of these ships, the "Sao Vicente," "Mormugao," "Sao Antao" and "Cunene," were the public property of the sovereign Government of Portugal employed in its public service carrying cargo, goods and supplies consisting largely of coal and petroleum for the account and benefit of said government (Affidavit of George S. Duarte in opposition to Motion to Dismiss or Affirm).

The opinion of Mack, Circuit Judge, in the "Pesaro, 277 Fed., 473, quoted in this appellee's brief is an interesting discussion, but it does not appear to be helpful to this appellee for it really does not decide anything; no final decision is given or decree directed. The judge states that the vessel was an ordinary merchant vessel employed for commercial purposes and that for this reason she should not be entitled to immunity. Still he goes on and expressing a doubt, says, that if he is in error in this belief, the vessel is not entitled to immunity because she is subject to the processes of the Italian courts. Upon this fact his conclusion is based. It is nowhere shown or suggested in these cases to be true of the ships of this appellant that they were subject to the

processes of the courts of Portugal. This reasoning if followed to its logical end, leads to some very strange results. A government, it is conceded, may submit itself and its property to the jurisdiction of its own court. The Italian Government consents to submit its ships, its property to the jurisdiction of its own courts, thereby it consents by implication to submit its sovereign property to the jurisdiction of any foreign sovereign's court. If this doctrine be correct, it is as reasonable to apply it to the sovereignty and property of the United States. Therefore, by consenting to be sued and submitting its property to the jurisdiction of its own courts it would thereby submit its property to the jurisdiction of the court of any foreign sovereign, and to that extent yield its sovereignty or immunity. To this proposition we doubt if anyone would agree as to our Government. In any event, it will be seen that the opinion of Judge Mack does not apply in these cases and that it cannot be regarded as in any way a precedent. In many respects, however, as showing what the law is, it is in support of the contentions of the appellant, as, where he says, "The general principle of the immunity of a sovereign state from suit without its express consent, is too deeply imbedded in our law to be uprooted by judicial decision" and "conservative opinion (among European jurists) seems to favor the non-suability of foreign sovereign states in practically all cases" (The Pesaro, 277 Fed., 473, 474, 483; Brief of Appellant DeSimone, pages 30, 47). Judge Mack appears in these opinions to lean toward the denying of immunity because he seems to feel that it might be desirable in some cases to subject foreign ships to the jurisdiction of the

Court, unlike Judge Hough, who in the "Maipo" case, supra, though he thinks that in certain circumstances the sovereign should be subject to the court's jurisdiction still, upon the principles of law upholds the immunity of the sovereign and its property.

POINT XIII.

These causes should be remanded to the lower Court with a direction to dismiss the libels for want of jurisdiction.

1. The law is, as we have, we believe, conclusively shown, that neither a foreign sovereign nor its property can be subjected to the jurisdiction of the United States Courts without its consent. Such a consent cannot be implied or waived. It must be an express consent by a legislative act, such as, in the case of this Government, an Act of Congress. No such consent of this sovereign appellant has been suggested. This appellant is such a sovereign and its ships are sovereign property. In order that a Court may hear and determine a controversy it must have jurisdiction both of the person and of the subject matter (United States vs. New York & O. S. S. Co., 216 Fed., 61, 63; Cooper vs. Reynolds, 10 Wall., 308). In these actions the lower Courts had neither jurisdiction of the subject matter nor of the person; they have exceeded their jurisdiction or have assumed a jurisdiction which they never had or could have. Of these facts this Court can and should take judicial notice and to prevent such an excess or assumption of juris-

diction, remand these causes to the District Court with a direction to dismiss the libels in personam against this appellant and in personam against its property in rem.

2. Much has been said by the appellees as to the time and manner of bringing the sovereignty and immunity of appellant to the attention of the Court. It is wholly immaterial when or how the question is raised. If at any time it appears to this Court that the action is against a foreign sovereign or its sovereign property this Court may properly OF ITS OWN MOTION direct a dismissal of the action to prevent any improper exercise of jurisdiction.

Dated, New York City, Sept. 29th, 1922.

Respectfully submitted,

F. DUDLEY KOHLER,
Proctor for Claimant and
Respondent-Appellant,
25 Broadway,
New York City.